Supreme Court, U.S.
FILED

01 288 AUG 16 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

LAS VEGAS SANDS, INC., d/b/a
SANDS HOTEL CASINO,

Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 225,
BARTENDERS UNION, LOCAL 165;
HARVEY McCOY; RON BYFORD,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

SAMUEL S. LIONEL
DAVID N. FREDERICK
Counsel of Record
TODD E. KENNEDY
LIONEL SAWYER & COLLINS
300 So. Fourth Street, #1700
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Las Vegas Sands, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Under the Worker Adjustment Retraining and Notification ("WARN") Act, does a legal obligation to pay severance benefits the employer is not otherwise obligated to provide, arising after an employer gives notice of a plant closing or mass layoff, preclude the employer from utilizing the WARN Act's severance benefits offset provision, so that an employer must either refuse to bargain over such benefits and thereby risk an unfair labor practice charge (and/or liability for not bargaining in good faith) or risk losing the offset if bargaining results in an agreement?

2. Can an employer not giving the 60-day notice of plant closing or mass layoff required by the WARN Act be required to pay its employees tips they might have received from customers, thereby subjecting the employer to additional financial obligations it would not have if it ceased providing products or services but kept its employees coming to work, creating economic disincentives to achieving the WARN Act's purpose of maximizing the opportunities for displaced workers to obtain job retraining and/or substitute employment?

CORPORATE DISCLOSURE STATEMENT

Las Vegas Sands, Inc. is not publicly traded, has no parent corporations and there is no publicly-held corporation which owns 10% or more of its stock. Las Vegas Sands, Inc. does have publicly traded debt.

TABLE OF CONTENTS

Page

Questions Presented i

Corporate Disclosure Statement ii

Opinions Below 1

Jurisdiction 2

Statutes Involved In This Case 3

Statement Of The Case 4

Reasons For Granting The Writ 7

I The Court Should Grant The Writ To Resolve The Practical Conflict Between Federal Labor Law And The WARN Act On Severance Benefits Resulting From The Decision Below 9

II The Court Should Grant The Writ To Resolve The Conflicts In Principle Between The Ninth And Other Circuits Over WARN Act Back Pay As A Make-Whole Remedy 11

Conclusion 16

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Breedlove v. Earthgrains Baking Companies, Inc., 140 F.3d 797 (8th Cir.), *cert. denied*, 525 U.S. 921 (1998), *rehearing denied*, 525 U.S. 1049 (1998)..... 12, 14, 15

Burns v. Stone Forest Indust., Inc., 147 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 1040 (1998).....12, 15

Carpenters Dist. Council v. Dillard Dep't Stores, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).....13, 15

First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)..... 10

Frymire v. Ampex Corp., 61 F.3d 757 (10th Cir. 1995), *cert. dism'd*, 517 U.S. 1182 (1996) 15

IAM v. Compania Mexicana De Aviacion, S.A. De C.V., 199 F.3d 796 (5th Cir. 2000) 10

Kirkwood Fabricators, Inc. v. NLRB, 862 F.2d 1303 (8th Cir. 1988)..... 10

North Star Steel Co. v. Thomas, 515 U.S. 29 (1995) ...11, 15

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)..... 11

Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553 (6th Cir. 1996)..... 15

Seattle-First Nat'l Bank v. NLRB, 638 F.2d 1221 (9th Cir. 1981) 10

TABLE OF AUTHORITIES – Continued

Page

United Steelworkers of Am. v. North Star Steel Co., 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 114, *rehearing denied*, 511 U.S. 1048 (1994) 14

Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994) 10

STATUTES AND RULES

Supreme Court Rule 13.1 2

28 U.S.C. § 1254(1) (1994) 2

28 U.S.C. § 1291 (1994) 2, 6

28 U.S.C. § 1331 (1994) 2, 5

29 U.S.C. §§ 201-219 (1994) 13

29 U.S.C. § 207(a)(1) (1994) 14

29 U.S.C. §§ 2101-2109 (1994) 1

29 U.S.C. § 2102 (1994) 3

29 U.S.C. § 2104 (1994) 3, 13

29 U.S.C. § 2104(a)(1)(A) (1994) 7, 13, 14

29 U.S.C. § 2104(a)(4) (1994) 11

29 C.F.R. § 531.60 (2001) 13

OTHER AUTHORITIES

134 Cong. Rec. 15,928 (1988) 9, 12

H.R. Conf. Rep. No. 100-576 (1988) 9, 11

S. Rep. No. 100-62 (1987) 11

PETITION FOR WRIT OF CERTIORARI

Las Vegas Sands, Inc. d/b/a Sands Hotel Casino ("Sands") respectfully prays that the Supreme Court of the United States issue a writ of certiorari to review the published opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on April 11, 2001, in order to resolve the practical conflict between Federal labor law and the WARN Act on the first question presented, and the conflicts in principle between the Ninth, the Third, the Eighth and other circuits on the second question presented, created by the opinion and judgment below on the important issues presented herein concerning the WARN Act (29 U.S.C. §§ 2101-2109 (1994)).

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is found at *Local Joint Executive Bd. of Culinary/Bartender, Inc. Trust Fund v. Las Vegas Sands*, 244 F.3d 1152 (9th Cir. 2001), and is reprinted in the Appendix ("App.") hereto at page App. 1.[1] The two Orders of the United

[1] There is also a separate unpublished memorandum disposition entered simultaneously with the published decision and judgment. The unpublished memorandum disposition addresses state law issues not addressed in the petition for rehearing and rehearing en banc and not addressed in this petition. Consequently, the unpublished memorandum disposition is not included in the Appendix hereto.

States District Court for the District of Nevada, one entered August 14, 1998, and the other entered May 4, 1998, relevant to the questions presented in this petition are unpublished and are reprinted in the Appendix hereto at pages App. 23 and App. 40 respectively.

JURISDICTION

On October 8, 1998, the United States District Court for the District of Nevada entered final judgment. Respondents timely filed their notice of appeal to the Ninth Circuit on October 19, 1998, and Sands timely filed its notice of cross-appeal on October 30, 1998. On April 11, 2001, the Ninth Circuit entered its decision and judgment. On May 18, 2001, the Ninth Circuit denied Sand's timely-filed petition for rehearing and rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The District Court had jurisdiction over respondents' WARN Act claims under 28 U.S.C. § 1331. The Ninth Circuit had jurisdiction over respondents' appeal and Sands' cross-appeal under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 3 of the WARN Act, 29 U.S.C. § 2102, provides, in relevant part, as follows:

> **(a) Notice to employees.** . . . An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order –
>
> > (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; . . .
>
> * * *

Section 5 of the WARN Act, 29 U.S.C. § 2104, provides, in relevant part, as follows:

> **(a) Civil actions against employers.** (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act [29 USC § 2102] shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for –
>
> > (A) back pay for each day of violation at a rate of compensation not less than the higher of –
> >
> > > (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
> >
> > > (ii) the final regular rate received by such employee; . . .
> >
> > * * *
>
> (2) The amount for which an employer is liable under paragraph (1) shall be reduced by –

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; . . .

* * *

(4) If an employer which has violated this Act proves to the satisfaction of the court that the act or omission that violated this Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees . . . may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

* * *

STATEMENT OF THE CASE

On May 15, 1996, Sands announced it would close its hotel casino in Las Vegas, Nevada on June 30, 1996. Sands provided 45-days' notice of the shutdown to all of its employees and all other entities entitled to notice under the WARN Act. On June 30, 1996, Sands closed its facility to the public. Sands did not require most of its employees to come into work after June 30, 1996, although it could

have done so. However, all of its employees (excluding those who had elected to start new jobs before July 1, 1996) were retained on Sands' payroll; they continued to earn their wages and contractual benefits at their regular rate for an additional 15 days, until July 15, 1996 (60 days after the closing announcement), excluding the days the employees would not have worked.

In addition to paying its employees their regular wages and benefits until July 15, 1996, Sands announced on or about June 4, 1996, that it would pay "severance pay" to all non-union full-time employees who had worked at the Sands for at least five years and were still employed on June 30, 1996, and thus actually displaced by the closing. This additional severance benefit ranged from two-weeks' pay for employees with five-years' seniority up to a full year's wages, depending upon their length of employment. Sands was not obligated by any prior contract, agreement or statute to offer to pay any form of severance benefits. After June 4, 1996, Sands negotiated a severance package with the union respondents that was memorialized in a Memorandum of Agreement signed July 3, 1996, giving Sands' unionized employees the same severance benefits Sands had announced on June 4, 1996 for its non-union employees. Ultimately, Sands paid in excess of $750,000 in severance benefits to the employees represented by respondents.

Respondents filed suit on August 21, 1996, asserting, inter alia, WARN Act claims, thereby invoking the jurisdiction of the district court under 28 U.S.C. § 1331. The parties filed cross-motions for summary judgment. The district court ruled that Sands was obligated to pay its tip-earning employees the tips they might have received

from customers during the 15-day violation period, even though Sands had no general obligation to guarantee its tip-earning employees tips or an opportunity to receive tips, and under the collective bargaining agreement between Sands and the union respondents. The regular rate of pay of unionized employees did not include tips. The District Court also ruled that Sands could not offset its severance payments against its WARN Act liability. With respect to Sands' nonunion employees, the district court ruled that Sands' announcement of the severance benefits, together with its employees continuing to work until June 30, 1996, resulted in a contract legally obligating Sands to pay the severance benefits. With respect to Sands' unionized employees, the district court ruled the Memorandum of Agreement legally obligated Sands to pay the severance benefits.[2]

After the district court entered final judgment, respondents timely appealed and Sands timely cross-appealed, thereby invoking the jurisdiction of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1291. The Ninth Circuit agreed with the district court on Sands' liability for tip income, relying on what the Ninth Circuit regarded as the traditional view of back pay as a make-whole remedy without regard to the

---

[2] The district court initially ruled, in its May 6, 1998 Order, that the Memorandum of Agreement lacked consideration because it was entered into after the hotel and casino had closed. Both parties moved for reconsideration of the May 6, 1998 Order, and the district court ruled in its Order entered August 17, 1998, that the Memorandum of Agreement was a collectively bargained agreement that did not require consideration to be legally binding.

unique statutory language of the WARN Act. The Ninth Circuit viewed the WARN Act's unique "regular rate" of compensation language in 29 U.S.C. § 2104(a)(1)(A) as merely creating a "floor" for WARN Act damages. The Ninth Circuit also agreed with the district court that Sands could not take advantage of the severance benefits offset provision of the WARN Act because Sands had a "legal obligation" to pay such benefits resulting from its employees continuing to work after announcement of such benefits and the Memorandum of Agreement between Sands and the union respondents.

Sands' timely petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

The WARN Act embodies a hard-fought compromise among the often competing and conflicting interests of employers, employees, governmental entities and local communities faced with a plant closing or mass layoff. Specifically, the WARN Act balances the needs of those potentially affected by such events for advance notice and assistance, against the employer's need for the legal and economic flexibility to take such actions when its business already may be facing economic adversity and thus unable to bear additional financial obligations. The WARN Act achieves this delicate compromise by requiring that covered employers give at least 60-days' notice of a plant closing or mass layoff, but if they fail to do so, imposing monetary penalties its sponsors intended to be no greater than the labor costs the employer would have

incurred had proper notice been given. The WARN Act thereby provides an incentive for the employer to give notice *without* further burdening an already distressed enterprise. On the other hand, where an employer has the financial resources to offer additional severance benefits the employer is not already obligated to provide, the WARN Act also provides statutory incentives for the employer to do so, by permitting such additional severance benefits to be offset against WARN Act penalties.

The decision below upsets this delicate compromise in two important respects. First, the decision below virtually destroys the severance benefits offset provision as an incentive to offer such benefits when displaced workers would gain the most from knowing about such benefits. Under the decision below, an employer cannot offer such benefits and allow its employees to continue working without risking loss of the offset, and an employer of unionized workers must risk either an unfair labor practice charge for failing to bargain in good faith over the effects of a plant closing or mass layoff, or loss of the offset if it bargains in good faith and reaches an agreement on severance benefits with its employees' unions. Second, by ignoring the purpose of the WARN Act's unique statutory provisions on back pay, and treating back pay as a make-whole remedy instead of a monetary penalty to induce compliance with its notice requirements, the decision below imposes *additional* financial burdens on employers when they may be least able to bear them. The decision thus creates economic incentives for an employer to keep its employees coming to work when there is nothing to do, thereby defeating

the WARN Act's objective of maximizing the opportunities of displaced workers to obtain job retraining and/or substitute employment.

I. The Court Should Grant The Writ To Resolve The Practical Conflict Between Federal Labor Law And The WARN Act On Severance Benefits Resulting From The Decision Below.

The WARN Act includes its severance benefit offset provision to encourage employers financially able to do so to offer their employees additional severance benefits they are not already obligated to provide to their employees when the offer is made. "The offset provision would . . . apply if an employer offers employees a payment (in the absence of any legal obligation), in a voluntary and unconditional effort to ease the burden or simply as a gesture of goodwill." H.R. Conf. Rep. No. 100-576, at 1052-53 (1988). "Our bill does allow for an employer who fails to give notice to reduce his backpay liability by making voluntary payments not previously required. That is the proper approach." 134 Cong. Rec. 15,928 (1988) (statement of Sen. Metzenbaum). Thus, the Ninth Circuit's holding below that the offset provision is not available where a "legal obligation" arises *after* notice of a plant closing or mass layoff from an employee's acceptance of an offer of special severance benefits the employer is not otherwise obligated to provide, directly conflicts with the legislative intent of the statute.

Moreover, the National Labor Relations Act requires that an employer of unionized workers bargain over the

effects of a plant closing or mass layoff. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 n.15, 681-82 (1981). Severance benefits are mandatory subjects of such "effects" bargaining, and an employer that refuses to bargain in good faith over severance benefits has committed an unfair labor practice, *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303 (8th Cir. 1988), and an employer that bargains without a good faith intent to reach an agreement is guilty of "surface bargaining," which is also an unfair labor practice, *Seattle-First Nat'l Bank v. NLRB*, 638 F.2d 1221, 1227 n.9 (9th Cir. 1981). Thus, under the decision below, an employer of unionized employees must risk either wilfully committing an unfair labor practice (and/or liability for not bargaining in good faith), or loss of the severance benefits offset if an agreement is reached that includes payment of severance benefits, at least absent a willingness on the part of the employees to completely release their WARN Act claims. *See IAM v. Compania Mexicana De Aviacion, S.A. De C.V.*, 199 F.3d 796 (5th Cir. 2000); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935-37 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994).

The Court should grant a writ of certiorari to resolve the practical conflict between Federal labor law and WARN Act incentives intended to benefit displaced workers.

II. The Court Should Grant The Writ To Resolve The Conflicts In Principle Between The Ninth And Other Circuits Over WARN Act Back Pay As A Make-Whole Remedy.

The Court has noted that the WARN Act imposes "penalties by way of a civil action" upon an employer who fails to give the 60-day notice of a plant closing or mass layoff required by the Act. *North Star Steel Co. v. Thomas*, 515 U.S. 29, 31 (1995). As the legislative history of the WARN Act makes clear:

> For violations of the notice provisions, damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 100-62, at 24 (1987). The H.R. Conf. Rep. No. 100-576, at 1052 (1988) similarly states that "an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employees prior to the layoff." Consequently, *unlike* traditional back pay awards intended to serve as a make-whole remedy for employees, the amount of a WARN Act "back pay" award is *not* reduced by an employee's earnings from other employment, *cf. Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941), but may be reduced where an employer's good faith and reasonable grounds for its actions justifies a lesser penalty, 29 U.S.C. § 2104(a)(4).

Thus, the WARN Act seeks to induce employers to give the requisite 60-day notice by holding them liable for the *same* labor costs they would have incurred had they given the 60-day notice required by the Act. However, as other courts have noted, the framers of the WARN Act were adamant that *additional* financial burdens *not* be imposed on employers. *See Breedlove v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797, 801 n.4 (8th Cir.) ("We also note that the Senate appears to have reached a consensus that the WARN Act is not a way 'to place an additional financial burden on the employers of this country.' 134 Cong. Rec. 15,928 (1988) (statement of Sen. Metzenbaum)."), *cert. denied*, 525 U.S. 921, *rehearing denied*, 525 U.S. 1049 (1998). Imposing *additional* financial burdens on employers already facing a plant closing or mass layoff is counterproductive for at least two reasons. First, doing so may cause an already-distressed employer to go out of business or cease operations completely, thereby aggravating the injury to its employees. Second, doing so may cause employers to insist that employees needlessly keep coming to work for the full 60-day period, even though no products or services are being produced, simply to avoid such additional financial burdens, when the workers' time could be much better spent in obtaining job retraining and/or substitute employment. *See Burns v. Stone Forest Indust., Inc.*, 147 F.3d 1182, 1184-85 (9th Cir.), *cert. denied*, 525 U.S. 1040 (1998).

The WARN Act's statutory language implements these twin objectives of inducing employers to give the requisite 60-day notice by holding them liable for the *same* labor costs they would have incurred had they done so, while *not* imposing *additional* financial burdens on the

employer, by measuring the penalty to be imposed on the employer by a unique definition of "back pay" that determines the compensation to be awarded as damages by the employee's "regular rate" of pay. 29 U.S.C. § 2104(a)(1)(A). No other Federal statute utilizing "back pay" as a remedy measures "back pay" by the employee's "regular rate" of pay. "Regular rate" is not defined in the WARN Act, but it is defined in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and the Department of Labor, in its amicus curiae brief filed with the Court in Case No. 93-1857, *Carpenters Dist. Council v. Dillard Dep't Stores*, 513 U.S. 1126 (1995), acknowledges that "[t]he term 'regular rate' derives from the Fair Labor Standards Act" and "the Secretary [of Labor] expressed his intent to, 'rely on the definitions found in the FLSA.' 54 Fed. Reg. 16042 (1989)," for the WARN Act. Brief For The United States As Amicus Curiae at 11 and n.8, *Carpenters Dist. Council v. Dillard Dep't Stores*, 513 U.S. 1126 (1995) (No. 93-1857). Under the FLSA, tips are *not* included in an employee's "regular rate" (unless the employer claims a tip credit for such tips, which Sands did not do) because: "Such tips are not payments made *by the employer* to the employee as remuneration for employment . . . " 29 C.F.R. § 531.60 (2001) (emphasis added).[3]

---

[3] The decision below concludes that the "not less than the higher of . . . " language in Section 5 of the WARN Act, 29 U.S.C. § 2104, establishes "a floor for WARN Act damages, thereby preventing employers from lowering wages shortly before closure in order to diminish their WARN Act liability." However, that conclusion is not inconsistent with limiting the employer's liability to amounts paid *by the employer* to the employee since, in unique circumstances, the amounts paid by the employer might exceed both of the alternative measures of

The decision below disregards the WARN Act's use of a unique measure of "back pay" as a penalty on employers to induce compliance with its notice requirements without imposing additional financial burdens on employers, and the derivation of "regular rate" in the WARN Act from the FLSA, where it is well-settled that tips are *not* included in the employee's "regular rate" of pay in the circumstances of this case. Consequently, the Ninth Circuit's decision below conflicts in principle with that of the Third Circuit in *United Steelworkers of Am. v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 114, *rehearing denied*, 511 U.S. 1048 (1994), as to whether WARN Act "back pay" is a penalty imposed on the employer or a make-whole remedy compensating employees for their lost earnings, and with that of the Eighth Circuit in *Breedlove v. Earthgrains Baking Companies, Inc., supra*, as to whether a WARN Act "back pay" award can impose additional financial burdens on employers

---

an employee's "regular rate" set forth in the statute. This is particularly true since the WARN Act requires payment of "back pay . . . at a *rate* of compensation not less than the higher of" the two alternative regular rates. 29 U.S.C. § 2104(a)(1)(A) (emphasis added). The FLSA contains language nearly identical to the WARN Act's "not less than" language. *See* 29 U.S.C. § 207(a)(1) (employer may not require that an employee work more than 40 hours a week "unless such employee receives compensation . . . at a rate not less than one and one-half times the regular rate at which he is employed."). No court has ever held that such language merely sets a "floor" that a court is free to exceed in order to transform the statutory measure of the employer's liability into a make-whole remedy for the employee.

they would not have if they kept their employees coming to work for the full 60-day notice period.[4]

The Court should grant a writ of certiorari to resolve the conflicts among the circuits as to the nature, purpose and proper functioning of a WARN Act "back pay" award.

---

[4] The Third Circuit in *North Star Steel Co.* recognized that WARN Act "back pay" is a penalty, not a make-whole remedy, concluding that WARN Act "back pay" is simply a measure of the amount of damages for which an employer is liable for each calendar day notice is not given, including days an employee would not have worked. However, the Third Circuit thereby imposed additional financial burdens on employers they would not have if they kept their employees coming to work for the full 60-day period. Thus, the Third Circuit's holding in *North Star Steel* is in direct conflict with the holdings of the Eighth Circuit in *Breedlove*, the Ninth Circuit in *Burns*, and every other circuit court to address the issue of whether WARN Act "back pay" must be paid for each calendar day or each work day proper notice is not given. *See Burns v. Stone Forest Indust., Inc., supra; Breedlove v. Earthgrains Baking Companies, Inc., supra; Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 558-61 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995), *cert. dism'd*, 517 U.S. 1182 (1996); *Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1282-86 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL S. LIONEL
DAVID N. FREDERICK
Counsel of Record
TODD E. KENNEDY
LIONEL SAWYER & COLLINS
300 So. Fourth Street, #1700
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Las Vegas Sands, Inc.

LOCAL JOINT EXECUTIVE BOARD OF CULINARY/ BARTENDER TRUST FUND; Bartenders Union, Local 165; Culinary Workers Union, Local 226; Harvey Mccoy; Ron Byford, Plaintiffs-Appellants,

v.

LAS VEGAS SANDS, INC., dba Sands Hotel Casino, Defendant-Appellee.

Local Joint Executive Board of Culinary/Bartender Trust Fund; Bartenders Union, Local 165; Culinary Workers Union, Local 226; Harvey Mccoy; Ron Byford, Plaintiffs-Appellees,

v.

Las Vegas Sands, Inc., dba Sands Hotel Casino, Defendant-Appellant.

Nos. 98-17065, 98-17322.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 14, 2000
Filed April 11, 2001

Andrew J. Kahn, McCracken, Stemerman, Bowen & Holsberry, Las Vegas, Nevada, for the plaintiffs-appellants-cross-appellees.

David N. Frederick, Lionel, Sawyer & Collins, Las Vegas, Nevada, for the defendant-appellee-cross-appellant.

Appeal from the United States District Court for the District of Nevada; Philip M. Pro, District Judge, Presiding. D.C. No. CV-96-00755-PMP/LRL.

Before: KOZINSKI, FERNANDEZ, and W. FLETCHER, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

Las Vegas Sands, Inc. ("Sands") violated the Worker Adjustment Retraining and Notification Act ("WARN Act" or "Act"), 29 U.S.C. §§ 2101-2109, by giving its employees 45 rather than 60 days advance notice of the closure of its hotel casino in Las Vegas. The Local Joint Executive Board of Las Vegas ("the Union") and two individual representatives of nonunion employees sued for damages under the Act. Sands does not dispute that it violated the Act and must pay damages, but it contends that payments it made shortly after the closure satisfy its statutory obligations. On cross-motions for summary judgment, the district court granted partial summary judgment to both sides. Both sides appeal.

We affirm all the substantive decisions of the district court on issues of federal law.[1] We hold that under 29 U.S.C. § 2104(a)(1)(A) tip income is included within the definition of "back pay" to which employees are entitled, and that employees who can prove that they would have worked on a holiday are entitled to back pay at the rate they would have been paid for that holiday. Further, we hold that under § 2104(a)(2)(B) payments made to nonunion employees on the condition that they not quit before the date of the closure are not "voluntary and unconditional payment[s]" that Sands may deduct from its WARN Act damages, and that payments made to union employees pursuant to a bargained-for

---

[1] However, we affirm in part and reverse in part the district court's substantive holdings on issues of state law, which we discuss in a separate unpublished memorandum disposition filed simultaneously with this opinion.

Memorandum of Agreement are also non deductible "voluntary and unconditional payment[s]."

We reverse one procedural decision. We hold that the district court erred in denying class certification to the would-be class of nonunion employees.

I

On May 15, 1996, Sands informed its employees that it would close its hotel casino on June 30, 1996. By providing only 45 days notice of the termination, rather than the 60 days required by the WARN Act, Sands became liable to each employee for "back pay" for the remaining 15-day period. *See* 29 U.S.C. §§ 2102-2104.

In a June 4, 1996 letter, Sands offered severance pay to some nonunion employees who would lose their jobs because of the closure. Under the terms of the letter, Sands would pay more than the WARN Act required to nonunion employees with more than five years service, subject to the condition that they remain at work until the actual closure. The letter did not offer anything to union employees because severance pay is a mandatory subject of bargaining. *See Kirkwood Fabricators, Inc., v. NLRB,* 862 F.2d 1303, 1306-7 (8th Cir.1988). After engaging in collective bargaining, Sands and the Union signed a Memorandum of Agreement ("MOA") on July 3, 1996, three days after the closure. The MOA provided that union employees would receive the same severance payments that the June 4th letter had offered to nonunion employees.

On June 30, 1996, Sands closed its hotel casino. On July 18, Sands paid its former employees what it deemed to be their WARN Act damages. In calculating damages, Sands compensated employees for working days rather than calendar days that fell within the 15-day period. Sands did not include in its calculations the tips the employees would have earned during the 15-day period of inadequate notice. Sands also did not include double time pay for those employees who would have worked on the July 4th holiday, even though employees working on that day would have been paid that additional amount. Sands paid both union and nonunion employees with more than five years service the severance promised in the June 4th letter and the MOA. Although Sands did not normally provide prorated vacation pay for nonunion employees who quit or were discharged prior to their service anniversary, it made prorated payments to those employees.

The Union, on behalf of its members, and individual plaintiffs, on behalf of a would-be class of nonunion employees, sued Sands for damages under the WARN Act.

II

The WARN Act provides that employers within the scope of the Act "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). Employers who violate the Act by failing to provide timely notice shall be liable to each aggrieved employee . . . for –

> (A) *back pay* for each day of violation at a rate of compensation not less than the higher of –
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee. . . .

29 U.S.C. § 2104(a)(1) (emphasis added).

When construing statutory language, we look first to its plain meaning. *See Sacramento Reg'l County Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1268 (9th Cir.1990). If the term at issue has a settled meaning, we infer that Congress meant to adopt that meaning unless other language in the statute compels a contrary meaning. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). If alternative readings are possible, we determine "whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir.1992); *see Sacks v. Commissioner*, 69 F.3d 982, 992 (9th Cir.1995). "Absent a clearly expressed legislative intention to the contrary," the language of the statute is "regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

In an earlier case brought under the WARN Act, we wrote that "[t]he term back pay has traditionally been understood to mean a sum equal to what [workers] normally would have earned had the violation not occurred." *Burns v. Stone Forest Indus. Inc.*, 147 F.3d 1182, 1185 (9th Cir.1998) (internal quotation omitted). However,

we have never, before this case, had occasion to decide the specific issue of whether tips and vacation pay are included within the term "back pay" as used in the WARN Act.

As used in other federal statutes, "back pay" consistently includes tips. *See, e.g., NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1348, 1351 (9th Cir.1994) (approving inclusion of tips in back pay calculation under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169); *Hilton Int'l Co. v. Union De Trabajadores De La Industria Gastronomica De Puerto Rico*, 600 F.Supp. 1446, 1451 (D.P.R.1985) ("tips are considered wages, part of [a worker's] compensation . . . and [are] properly included in a back pay award" for breach of a collective bargaining agreement under the NLRA (citations omitted)); *In re Club Troika, Inc.*, 2 NLRB 90, 94 (1936) (noting that, under the NLRA, "in order that the discharged employees may be 'made whole' the term 'back pay' must . . . be regarded as including both the wage paid and the tips received"); *Jackson v. McCleod*, 748 F.Supp. 831, 836 (S.D.Ala.1990) (including tips in the calculation of back pay under 42 U.S.C. § 1981).

As used in other federal statutes, "back pay" also includes holiday and overtime pay. *See, e.g., Nichols v. Frank*, 771 F.Supp. 1075, 1079 (D.Or.1991) (taking into account night and weekend-shift differentials in back pay calculation under Title VII of the Civil Rights Act of 1964), *aff'd. Nichols v. Frank*, 42 F.3d 503, 516 (9th Cir.1994); *see also Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir.1974) (finding under Title VII that "the ingredients of back pay should include more than 'straight salary' ": "Interest, overtime, shift

differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay."); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1562 (11th Cir.1986) (same); *Meadows v. Ford Motor Co.*, 510 F.2d 939, 947 (6th Cir.1975) (same); *Minette Mills, Inc.*, 316 N.L.R.B. 1009, 1013 (1995) (affirming inclusion of credit for paid holidays in back pay calculation under NRLA); *Kossman v. Calumet County*, 849 F.2d 1027, 1033 (7th Cir.1988) (affirming inclusion of overtime pay in back pay calculation under Age Discrimination in Employment Act).

Sands contends that the term back pay is not used in its normal sense in the WARN Act. It argues that WARN Act damages are a penalty designed to deter future violations, rather than the traditional labor relations make-whole remedy designed to compensate employees for their losses, and that "back pay" under the WARN Act therefore includes neither tips nor holiday pay that an employee would have received if he or she had worked during the period of a WARN Act violation.

A

Sands urges us not to look to other federal statutes but to other provisions of the WARN Act. Under 29 U.S.C. § 2104(a)(1)(A)(i) and (A)(ii), the Act establishes a floor for damages, using either an average rate of compensation for the last three years or a final regular rate of compensation, whichever is higher. Sands argues from subsections (A)(i) and (A)(ii) that "back pay" under the Act is not the amount the employee actually would have earned during the period of violation. We disagree.

The Act states that an employer is liable for back pay at a rate *not less than* the higher of the calculations specified in subsections (A)(i) and (A)(ii). These subsections do not define "back pay"; rather, they establish a floor for WARN Act damages, thereby preventing employers from lowering wages shortly before closure in order to diminish their WARN Act liability.

Sands also argues that the Act lacks a key feature of classic back pay provisions: an offset for other earnings received during the period for which back pay is owed. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197, 61 S.Ct. 845, 85 L.Ed. 1271 (1941) (defining back pay under the NLRA as "a sum equal to what [the employees] normally would have earned from the date of discrimination to the time of employment *less their earnings during this period* " (emphasis added)). According to Sands, if Congress had meant for WARN Act damages to compensate employees for actual lost earnings, it would have allowed a deduction for other earnings. However, we are more persuaded by the reasoning of the Fifth Circuit:

> There are plausible reasons why Congress could choose not to include a provision that would make the WARN compensation provisions purely remedial, e.g., the desire to avoid placing a burden on a terminated employee to mitigate damages by taking any job offered, the desire to give a terminated employee a window of time to readjust without immediately having to search for a job, the desire for simplicity in the statutory scheme, etc.

Carpenters District Council of New Orleans v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1284 n. 14 (5th Cir.1994); *accord Saxion v. Titan-C-Mfg., Inc.*, 86 F.3d 553, 560 (6th Cir.1996) (quoting *Dillard*).

B

We believe that the normal meaning of back pay is consistent with the overall purpose of the WARN Act. *See United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir.1999), *cert. denied*, 528 U.S. 1102, 120 S.Ct. 860, 145 L.Ed.2d 710 (2000) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.") (quoting *United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir.1995)). We have previously held that the Act "is a wage worker's equivalent of business interruption insurance [that] protects a worker from being told on payday that the plant is closing that afternoon and his stream of income is shut off." *Burns*, 147 F.3d at 1184. A "stream of income" does not distinguish among sources of that income. Whether an employee's income is paid by the employer or by tipping customers, or whether it is regular or holiday pay, it is all part of an employee's "stream of income."

The conclusion that the WARN Act was intended to provide "workers . . . what they would have earned in the two-month notice period, were there no shutdown" led us to hold in *Burns* that workers should be compensated for work days in the violation period, not calendar days. *Burns*, 147 F.3d at 1184 (noting that the work-day approach "serves the statutory purpose of providing a two-month uninterrupted income stream facilitating a job

search"). The Fifth and Sixth Circuits have come to the same conclusion. *See Dillard*, 15 F.3d at 1283; *Saxion*, 86 F.3d at 560. *But see United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 42-43 (3d Cir.1993) (concluding that "WARN uses the term 'back pay' simply as a label to describe the daily rate of damages payable" and thus calendar days, not work days, are the appropriate damages benchmark).

While some provisions of the Act are punitive in nature, the primary purpose of the Act is remedial. Among other things, we note that the Act waives a $500 per day penalty otherwise owed by the employer to the government if the employer pays laid-off employees their "back pay" under the WARN Act within three weeks of the ordered layoff. *See* 29 U.S.C. § 2104(a)(3). Congress was clearly concerned with ensuring an income stream, or, in the words of the governing regulation, with "provid[ing] protection to workers, their families and communities." 20 C.F.R. § 639.1(a). Indeed, the Senate report on the "Economic Dislocation and Worker Adjustment Assistance Act," from which WARN's provisions were ultimately severed and separately enacted, explicitly stated that the Act's purpose was to "assur[e] the most rapid possible readjustment and retraining of displaced workers" and to "eas[e] the personal and financial difficulties for workers who must make these transitions." S.Rep. No. 100-62, at 3 (1987).

C

Because "back pay" under the WARN Act is a make-whole compensatory remedy, damages under the Act

should compensate employees for the money they would have earned but for the premature closure in violation of the WARN Act. We therefore hold that Sands must pay its employees, as WARN Act damages, not only what Sands would have paid them directly but also what they would have received in tips. For the same reason, we also hold that Sands must pay employees who would have worked on July 4th the amount they would have earned on that day.

Individual employees must, of course, be able to prove the amount of tips they would have received. Similarly, they must be able to prove that they would have worked on July 4th. We are unable to determine on this record how difficult such proof will be, but we wish to make clear that both are matters to be proved rather than assumed.

III

The WARN Act allows an employer to reduce its liability under the Act by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(B). Sands contends that this provision allows it to deduct the severance payments made to nonunion employees under the terms of its June 4th letter, and to its union employees under the terms of the July 3rd MOA. We agree with the district court that the payments were not voluntary and unconditional and that they are thus not deductible.

Sands' June 4th letter offered severance payments to nonunion employees with over five years experience, but

only on the condition that the employees remain on the job until the hotel casino closed. The letter constituted an offer under Nevada law. *See Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85, 86 (1961) (stating Nevada law). An offeree's performance in return for what is offered constitutes consideration, and an enforceable contract results from that performance. *See id.* Sands' nonunion employees accepted Sands' offer and provided consideration by working until the hotel casino closed. After performance by the nonunion employees, Sands had a legal obligation to make the severance payments promised in the June 4th letter. Because the payment was obligatory, Sands was not entitled to any deduction from its WARN Act liability under § 2104(a)(2)(B). *See Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 144, 152 (3d Cir.1998) (holding that ERISA payments that employer was legally obliged to pay were not voluntary and unconditional under the WARN Act).

Sands could not unilaterally offer its union employees the terms of the severance pay it offered its nonunion employees. Rather, it was required to bargain with the Union over those terms. Sands and the Union concluded their MOA on July 3, 1996, three days after the hotel casino closed. Because the MOA was not signed until after the closure, the union employees necessarily did not provide consideration by remaining on the job through the closure. It does not follow, however, that there is no enforceable legal obligation. As the parties concede, the MOA is a legally binding collective bargaining agreement, even in the absence of conventional consideration. *See Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269, 1271

(9th Cir.1979) (noting that courts have held that "consideration is not necessary to make a collective bargaining agreement enforceable" (citation omitted)).

Sands also seeks to deduct, pursuant to 28 U.S.C. § 2104(a)(2)(B), payments to terminated nonunion employees for accrued vacation time. We agree with the district court that these payments should not have been deducted. Payment for accrued vacation time is commonly considered a form of deferred compensation. For example, "Courts have held . . . that vacation pay, provided upon fulfillment of specific work requirements, can constitute deferred compensation, due even after expiration of a collective bargaining agreement." *Upshur Coals Corp. v. United Mine Workers of America, Dist. 31*, 933 F.2d 225, 229 (4th Cir.1991) (collecting cases). We agree with the district court that Nevada courts would likely conclude that Sands had a legal obligation under Nevada law to pay for vacation time that had accrued from work already performed, even for employees who had not reached the anniversary date of their employment. As the district court explained, the employees' failure to reach the anniversary date was excused, and the employer's obligation to pay was triggered, by the fact that Sands prevented the employees' performance by closing their workplace. *See Cladianos v. Friedhoff*, 69 Nev. 41, 240 P.2d 208, 210 (1952) (stating that when a promisor himself prevents performance, that performance is excused).

IV

Individual plaintiffs Harvey McCoy and Ron Byford appeal the district court's refusal to certify a class of

between 162 and 215 nonunion employees under Federal Rule of Civil Procedure 23(b)(3). We conclude that the district court erred in denying class certification.

A

We first address the standard under which we review the district court's decision. The district court initially denied, without explanation, McCoy and Byford's class certification motion on November 18, 1997. In response to a request by the parties, the district court issued an order on October 15, 1998, stating in its entirety:

> The reasons for denying Plaintiffs' Motions for Class Certification in the Order of November 18, 1997, were as follows:
>
> 1. The Court concluded that Plaintiffs had failed to demonstrate the predominance of common questions of law and fact in accord with Rules 23(a)(2) and (b)(3) of the Federal Rules of Civil Procedure;
>
> 2. The Court concluded on the basis of the authorities and evidence presented by the parties that Plaintiffs failed to demonstrate that a class action afforded a superior format for the resolution of Plaintiffs' claims.
>
> 3. The Court found that because there was no basis for concluding that this was a "limited fund" case, there was no justification for class certification under Fed.R.Civ.P. 23(b)(1)(B).
>
> 4. Finally, the Court concluded that neither Plaintiffs McCoy nor Beyford [sic] had

demonstrated that they were adequate class representatives in this particular case.

We ordinarily review a district court's class certification decision for abuse of discretion. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir.1997); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233-34 (9th Cir.1996). "If the trial judge has made findings as to the provisions of the Rule and their application to the case, his determination of class status should be considered within his discretion." *Clark v. Watchie*, 513 F.2d 994, 1000 (9th Cir.1975) (citations omitted). However, when a district court's decision is not "supported by findings as to the applicability of Rule 23 criteria," it is not entitled to the traditional deference given to such a determination. *Gibson v. Local 40, Supercargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union*, 543 F.2d 1259, 1263 n. 2 (9th Cir.1976); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179-80 (9th Cir.1974) (vacating and remanding for reinstatement of class status), *disapproved on other grounds in Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 479 n. 2, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978); *see also Inda v. United Air Lines, Inc.*, 565 F.2d 554, 563 (9th Cir.1977) (remanding for a "sufficiently explicit order").

It is clear that the district court's November 18, 1997, order did not satisfy the requirement of *Clark*, *Gibson* and *Price*. The more difficult question is whether the district court's October 15, 1998 order did so. The four operative sentences of the October 15 order paraphrase four provisions of Rule 23 and indicate the court's conclusion that those provisions were not satisfied. These sentences, however, do not explain why the court concluded that the

provisions were not satisfied on the facts of this case. That is, in the words of *Clark*, the district court "made findings as to the provisions of the Rule," but made no findings as to "their application to the case." 513 F.2d at 1000. We thus do not have the facts necessary to warrant the deference we normally accord to the district court's class determinations. *See Gibson*, 543 F.2d at 1263 n. 2. However, we believe that the factual record is sufficiently well developed that we may evaluate for ourselves whether the provisions of Rule 23 have been satisfied, and that we therefore do not need to remand for a determination of class action status. *Compare id.* at 1264 ("Since the trial has been completed and a full record is before us, it is appropriate that we determine whether the action is to be maintained as a class action.").

B

Plaintiffs sought certification as a "damages" class action under Rule 23(b)(3) or, alternatively, as a "common fund" class action under Rule 23(b)(1). We agree with the district court that this action is unsuited for common fund certification. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838-40, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). However, we find insufficient grounds in the record to support a denial of certification of a "damages" class action under Rule 23(b)(3). We discuss the district court's three bases for denying certification of such a class in the following order: (1) the adequacy of the would-be class representatives, as required by Rule 23(a)(4); (2) the predominance of common questions of law or fact, as required by Rule 23(b)(3); and (3) the superiority of a

class action to other methods for the fair and efficient adjudication of the controversy under Rule 23(b)(3).

1

Rule 23(a)(4) requires that "the representative parties [must] fairly and adequately protect the interests of the class." "Adequate representation 'depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.' " *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir.1994) (quoting *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir.1992)). The district court stated that "neither . . . McCoy nor Byford . . . demonstrated that they were adequate class representatives in this particular case." We believe that this conclusion is not supported by the record as to McCoy.[2] McCoy worked as a dealer for Sands until it closed on June 30, 1996. Like other members of the proposed class of dealers, he received the sort of post-termination payment from Sands that we hold to have been insufficient under the WARN Act.

Sands emphasizes that, at the outset of the litigation, McCoy declined to be a class representative. McCoy

---

[2] Because the adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative, we do not address the adequacy of Byford. *See Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 128 (3d Cir.1987), *rev'd in part on other grounds, Reed v. United Transp. Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989).

testified in his deposition that he initially declined to represent the class because he was unemployed and feared being blackballed by Nevada employers. Notwithstanding this fear, however, he contacted counsel, organized his co-workers, galvanized support for proceeding collectively, and spearheaded the meeting at which the initial class representative, Joseph Tortomas, volunteered to represent his fellow dealers. When Tortomas became unable to serve because of health problems, McCoy had found a job in another state and agreed to represent the class. We do not believe that the record supports a conclusion that McCoy is either unwilling or unable to serve as a class representative. The record indicates clearly that he understands his duties and is currently willing and able to perform them. The Rule does not require more.

The competence of counsel seeking to represent a class is also an appropriate consideration under Rule 23(a)(4). *See Crawford*, 37 F.3d at 487. Would-be class counsel in this case are labor lawyers experienced in class actions, and the record does not support a finding that they do not satisfy the requirements of the Rule.

2

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3).[3] "The Rule 23(b)(3) predominance

---

[3] The district court's order states that the class fails to satisfy the predominance requirement of Rule 23(a)(2) as well as

inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (citation omitted).

> In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir.1998) (internal quotation omitted).

Here, as in *Hanlon*, "[a] common nucleus of facts and potential legal remedies dominates this litigation." *Id.* Members of the putative class were all terminated on the same day with the same inadequate notice. All would-be class members share a common interest in three issues we heard on appeal in this case: (1) whether "back pay" under the WARN Act includes tips; (2) whether Sands is entitled to deduct severance payments from its WARN Act liability; and (3) whether Sands' mid-July wage payments to nonunion employees were timely under Nevada law.[4]

---

that of Rule 23(b)(3). Rule 23(a)(2) requires only that there be common questions of law or fact. It has no predominance requirement. *See* Fed.R.Civ.P. 23(a)(2).

[4] We address the third issue in our separate unpublished memorandum disposition.

Individualized issues are few, and most of them are likely to be relatively easy. For example, the damages for individual class members will entail a straightforward calculation of which days and how many hours they would have worked, and how much they would have earned in tips. Because dealers' tips were counted and divided in the casino cashier's cage, Sands has detailed written records of the tips employees earned in the past. Because Sands required its dealers to pool tips, there is no variation in tip earnings based on individual performance. We recognize that there may be some variation among the individual employees, as well as some potential difficulty in proof, in demonstrating that they would have worked on July 4th. But given the number and importance of the common issues, we do not believe that this variation is enough to defeat predominance under Rule 23(b)(3).

3

A Rule 23(b)(3) class action must also be "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) provides a non-exhaustive list of factors to consider in determining superiority:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the

> difficulties likely to be encountered in the management of a class action.

Id. The district court's order did not mention any of these factors. Our own analysis convinces us that none weighs against class certification.

This case involves multiple claims for relatively small individual sums. Counsel for the would-be class estimated that, under the most optimistic scenario, each class member would recover about $1,330. If plaintiffs cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover. "Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also* 7A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1779 (2d. ed. 1986) ("[I]f a comparative evaluation of other procedures reveals no other realistic possibilities, this [superiority] portion of Rule 23(b)(3) has been satisfied.").

Moreover, members of the would-be class appear to agree with the choice to litigate as a class. Three would-be class members – Earl Hill, Earl Chew, and Candy Vasco – explicitly stated that they wished to be represented by McCoy and Byford. No would-be class member has expressed a desire to proceed independently. From the record before us, there appear to be no individual actions now pending, and no unusual obstacles that would make managing the class particularly difficult.

On the facts of this case, we conclude that the superiority requirement of Rule 23(b)(3) is easily satisfied.

C

We are unable on the present record to determine all issues relevant to class certification. For example, the parties disagreed in the district court over the precise definition of the class. Because the district court refused to certify the class at all, it did not resolve this disagreement. Further, it is possible that other class representatives, in addition to McCoy, might be necessary to represent the full range of interests among the class members. We leave these and other issues that might need further development to be addressed by the district court on remand.

V

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings not inconsistent with this opinion. Costs on appeal shall be divided between defendant and the plaintiffs.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, an association of labor organizations comprising CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165, HARVEY McCOY and RON BYFORD,

Plaintiffs,

v.

LAS VEGAS SANDS, INC., d/b/a SANDS HOTEL CASINO,

Defendant.

CV-S-96-000755-PMP (LRL)

ORDER

(Filed Aug. 14, 1998)

Presently before the Court is Plaintiffs Local Joint executive Board ("the Union"), Harvey McCoy, and Ron Byford's Motion for Reconsideration (#81) filed on May 18, 1998. Defendant Las Vegas Sands, Inc. ("Sands") filed an Opposition (#88) on June 12, 1998. On July 9, 1998, Plaintiffs filed a Reply (#94). Also before the Court is Sands Motion for Reconsideration (#83) filed on May 20, 1998. Plaintiffs filed an opposition (#84) on June 1, 1998. On June 26, 1998, Sands filed a Reply (#90).

I. Motions for Reconsideration

On May 4, 1998, this Court entered an Order (#80) granting and denying partial summary judgment to Plaintiffs and granting and denying partial summary judgment to Sands. In its Motion for Reconsideration, Plaintiffs claim that the Court erred when it allowed Sands to deduct severance payments made to union employees from the damages it owed under the Worker Adjustment Retraining Notification Act ("WARN Act" or "the Act"). In its Motion for Reconsideration, Sands claims that the Court erred when it found that Sands violated Nevada law. The facts in this case are extensively described in the prior Order and will not be repeated here.

A district court has broad discretion in determining if it should reconsider a prior order. *United States v. Emens*, 565 F.2d 1142, 1145 (9th Cir. 1977). A party may make a motion for reconsideration pursuant to either Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b). *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Rule 59(e) provides that a party can make a motion to alter a judgment within ten days when a court enters judgment. Reconsideration under a Rule 59(e) motion is appropriate if the district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in the controlling law." *ACandS, Inc.*, at 1263. If a party makes a motion within a reasonable time, Rule 60(b) provides that a court can relieve a party of a judgment for the following reasons:

> 1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

See also ACandS, Inc., at 1263.

A. The Plaintiffs' Motion for Reconsideration

The WARN Act allows employers to deduct "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C.A. § 2104 (a) (2) (B) (West Supp. 1998). Plaintiffs moved for summary judgment on the issue of whether Sands could deduct the severance paid to union workers from its WARN Act damages. Sands had agreed to pay severance to union workers in a Memorandum of Agreement it signed on July 3, 1996. Plaintiffs argued that the Memorandum was a legal obligation because the union members working until closing constituted consideration. This Court rejected that argument because the Memorandum was signed after Sands had closed and the employees' work was past consideration. (Order #80 at 21.) Since the Court rejected Plaintiffs' argument, it

granted summary judgment on the offset issue in favor of Sands.

Plaintiffs are now asking the Court to reconsider its initial ruling. Plaintiffs base their Motion for Reconsideration on legal theories they never raised in their Motion for Partial Summary Judgment. Plaintiffs alternatively argue that consideration is not required under federal law, that allowing Sands to stop bargaining was consideration, that a June 4, 1996 memorandum created an option contract, that exceptions to past consideration apply, or that the Union and Sands reached an agreement concerning severance before closing. In addition to disputing the legal theories offered by Plaintiffs, Sands responds that the Court should not consider this Motion because it contains new legal theories.

The Court must first decide if it should consider the merits of Plaintiffs' new legal theories. Plaintiffs claim that the Court should reconsider summary judgment on the severance issue and consider the new legal arguments because it sua sponte granted summary judgment on the severance issue to Sands. According to Plaintiffs, they did not raise all of their legal arguments because they did not expect the Court to take this action.

However, the Ninth Circuit Court of Appeals allows a court to sua sponte grant summary judgment for an opposing party if the moving party had a "full and fair opportunity to ventilate the issues involved in the motion." *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982). Plaintiffs had a full and fair opportunity to raise all of their legal arguments concerning the severance issue. They sought summary judgment on the issue

and had both their initial Memorandum of Points and Authorities and their Reply to explain why the Court should grant summary judgment in their favor. Therefore, the Court's action in sua sponte granting summary judgment for Sands was proper.

When a sua sponte grant of summary judgment is not an issue, courts often refuse to consider arguments first raised in a motion for reconsideration unless the party can demonstrate why the argument was not raised in the initial motion. *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 810 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1103 (1996). Courts will occasionally consider new arguments or authority when it is in the interest of justice. *See Thurman Indus., Inc. v. Pay'N Pak Stores, Inc.*, No. C84-1171R, 1987 WL 14673 at *1 (W.D. Wash. Aug. 6, 1987). The Court believes it is in the interest of justice for the Court to consider Plaintiffs' new arguments because an incorrect decision based on the arguments in Plaintiffs' Motion for Partial Summary Judgment would affect the recovery of the union employees.

In its prior Order, the Court determined that the Memorandum of Agreement between the Union and Sands was not a binding, legal obligation because it lacked consideration. Plaintiffs now argue that federal law does not require consideration for collectively bargained agreements to be binding. Plaintiffs cite a Ninth Circuit Court of Appeals case where one issue was whether a collective bargaining agreement could be orally modified. *Certified Corp. v. Hawaii Teamsters and Allied Workers, Local 996*, 597 F.2d 1269, 1271 (9th Cir. 1979). The court noted that traditional contract rules do not always apply to collective bargaining agreements and

that consideration is not needed to make such an agreement enforceable. *Id.* The *Certified Corp.* court relied on *Darnel v. East*, 573 F.2d 534, 537 (8th 1978), which found that collectively bargained participation agreements are often decided without questioning consideration. Plaintiffs also cite a case where a union and an employer entered into a settlement agreement when the employer sold the business. *Lumpkin v. International Harvester Co.*, No. 81 C 6674, 1986 WL 1996 at *2 (N.D. Ill. Feb. 10, 1986). The court found that the agreement was not unenforceable due to a lack of consideration. *Id.* at *18.

Sands only response to Plaintiffs' case authority is in a footnote. Sands argues that consideration is not questioned in collective bargaining agreements because the parties understand that the employees' labor is the consideration. (Sands' Opp'n to Mot. for Partial Summ. J. at 7.) However, although dicta, the *Certified Corp.* court specifically stated that consideration is not necessary. The cases cited by Plaintiffs provide persuasive authority that the Ninth Circuit Court of Appeals would find the Memorandum of Agreement between Sands and the Union to be a binding legal obligation. Therefore, this Court finds the Memorandum of Agreement binding.[1]

Despite arguing that Plaintiffs' analysis of federal labor law is incorrect, Sands now admits that the

---

[1] Since the Court determines federal labor law does not require the Memorandum of Agreement to have consideration to be binding, it will not consider Plaintiffs' alternative arguments that the agreement was binding.

Memorandum of Agreement is binding.[2] (Sands' Opp'n to Mot. for Partial Summ. J. at 5.) Sands argues it can still deduct the severance pay it gave union members from the WARN Act damages because the parties did not sign the Memorandum until after the Sands closed. Sands also argues that the Court's prior order supports this conclusion. Sands misreads the Courts prior Order. The timing of the agreement was only important in the prior order because the timing resulted in an agreement that was not binding. The WARN Act specifically states that an employer can deduct payments that are not required by legal obligation. 29 U.S.C.A. § 2104(a)(2)(B). The Act does not provide that an employer can deduct payments required by a legal obligation entered into after a plant closing. Since the Court now concludes that the Memorandum of Agreement was a legal obligation, Sands cannot deduct the severance pay from its damages.

B. Sands' Motion for Reconsideration

Sands seeks reconsideration of this Court's determination in its prior Order that Sands owed damages under Nevada's prompt payment statutes. Nev. Rev. Stat. §§ 608.020, .040, .050 (West 1997). Sands implicitly argues that it does not owe damages under Nevada law to any employees. Alternatively, Sands argues it does not owe damages to the union employees.

---

[2] Sands claims that it has always maintained that the Memorandum was binding. (Sands' Opp'n to Mot. for Partial Summ. J. at 5.) However, in opposing Plaintiffs' arguments on the severance issue, Sands has implicitly argued that the Memorandum is not binding.

1. All Employees

Sands maintains that it should not owe damages to any of its former employees under the Nevada prompt payment laws for two reasons. In the prior Order, the Court found that under common law Sands terminated its employees as of June 30, 1996, and therefore, Sands owed damages under Nevada law. First, Sands claims that the Court committed an error of law because the Nevada prompt payment laws do not apply when an employer has paid wages under the WARN Act. Second, Sands argues that it should not have to pay the damages because it acted in good faith with regard to promptly paying its employees.

According to Sands, the Nevada prompt payment laws should not apply to a WARN Act case because the laws do not apply to plant closings. Nev. Rev. Stat. § 608.040 provides a penalty if an employer does not pay a discharged or quitting employee within the proper amount of time. Nev. Rev. Stat. § 608.050 provides a penalty if an employer does not pay a discharged or laid off employee within the proper amount of time. The parties agree that the Sands employees did not voluntarily quit their employment. Sands argues that they were not laid off because they did not have a reasonable expectation of being rehired. Sands also reasons that its former employees do not qualify as discharged employees because the collective bargaining agreement between Sands and the Union ("the CBA") specifically defined "discharge" to mean a termination for "just cause" such as misconduct or poor work. (CBA ¶ 6.01.) Since neither party suggests that the Sands terminated its employees

for a reason other than the casino closing, Sands maintains that the employees were discharged. Therefore, the laws do not apply because the Sands employees did not quit, were not laid off, and were not discharged.

Plaintiffs respond that the term "discharge" as used in the Nevada laws could also apply to the plant closing situation. The Court agrees. Other courts have found that "discharge" is a general term that refers to a termination. *See e.g. Gaspar v. United Milk Producers,* 62 Cal. App. 2d 546, 550 (Cal. Ct. App. 1944). The Court finds that the Nevada courts would interpret "discharge" to include general terminations in order to include all situations were [sic] an employee involuntarily loses his or her job.

While arguing that the Nevada prompt payment laws should not apply to the situation where an employer pays wages after closing because of the WARN Act, Sands returns to its prior argument that July 15, 1996 was actual closing date of the casino because it paid wages until that day. As support, Sands cites *Holland v. National Steel Corp.,* 791 F.2d 1132 (4th Cir. 1986) (disapproved on other grounds in *Massachusetts v. Morash,* 109 S. Ct. 1668, 1671 (1989)). In *Holland,* an employer continued to pay an employee vacation pay after it laid off the employee. *Id.* at 1134. The court, without explanation, found that the employee's effective layoff date for the purposes of Virginia prompt payment law was the date that the employer stopped paying vacation pay. *Id.* at 1136. An unexplained, nonbinding decision does not persuade this Court to change its prior decision that under reality and under common law Sands terminated the employees as of their last day of work, June 30, 1996. Sands offers no

other reason why Nevada courts would not apply Nevada's prompt payment law in a situation where an employer pays wages because of the WARN Act. Therefore, the Court concludes the Nevada prompt payment laws apply to this case.

Sands other argument that the Nevada laws should not apply to any employees merits little discussion. Sands claims that it acted in good faith with regard to payment and should therefore be exempt from the laws. Unlike the laws of other states, the Nevada laws do not require that Sands act in bad faith before they are applicable. *See e.g.* Cal. Labor Code § 203 (West 1997) (employer must willfully fail to pay wages due to discharged employees to be liable). If the Nevada Legislature wanted a good faith exemption, it could have easily added it to the law. This Court will not imply such a provision. The Court's prior Order (#80) that Sands must pay damages under Nevada law to the nonunion employees remains unchanged.

2. Union Employees

Sands argues that it does not owe damages under Nevada law to the union employees. Sands' position is that Nevada law allows collective bargaining agreements to control payment after termination. As an alternative, Sands contends that the Memorandum of Agreement between Sands and the union was a waiver of the union employees' rights under Nevada law.

Sands and the Union signed a Memorandum of Agreement that set forth a settlement concerning the effects of the closing on the union employees. In its prior Order, the Court considered whether that Memorandum

operated as a waiver of the union employees' right to be paid after their June 30, 1996 termination.[3] The Court then found that even if Nevada law allowed employees to waive their rights in a collective bargaining agreement, the potential waiver in the Memorandum was not clear and unmistakable.

Sands convincingly argues that the Court should not have used a waiver analysis in the prior order because Nevada law allows the parties to agree to a payment schedule different from that proscribed in the statute. The Court agrees that it should not have immediately jumped to a waiver analysis. If Nevada law allows the employees to agree to a payment schedule, then the employees are not waiving any rights by doing so. Therefore, the court must examine the Nevada prompt payments statutes more closely and decide if Nevada law allows collective bargaining agreements to control timing of final payment to employees.

There are several Nevada statutes governing when employees must be paid when they stop working. Nev. Rev. Stat. § 608.020 provides that when an employer discharges an employee, the employee's earned wages are due and payable. If an employee resigns or quits, an employer must pay his or her wages on the earlier of his or her next scheduled payday or within seven days. Nev. Rev. Stat. § 608.030. If the employee is discharged or

---

[3] This Court should not have considered whether the Memorandum of Agreement operated as a waiver in its first order because the Court found that the Memorandum was not binding.

quits, and the employer does not pay within the scheduled time for quitting employees or within three days for discharged employees, the employee's wages continue until paid or for thirty days. Nev. Rev. Stat. § 608.040. Nev. Rev. Stat. § 608.050 states the following:

> Whenever an employer of labor shall discharge or lay off his or its employees without first paying them the amount of any wages or salary then due them, . . . , or shall fail, or refuse on demand, to pay them in like money, . . . , the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, . . . , each of his or its employees may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default, until he is paid in full, without rendering any service therefor; but he shall cease to draw such wages or salary 30 days after such default.

According to Sands, section 608.050 allows a collective bargaining agreement to govern when an employer must pay an employee after discharge. There are no Nevada cases discussing this precise issue. However, an opinion of the Nevada Attorney General suggests how the Nevada Supreme Court might decide this issue. The Nevada Attorney General found that section 608.050 allows a collective bargaining agreement to govern payment timing rules. 1994 Op. Nev. Att'y Gen. No. 25 (Dec. 31, 1994) [hereinafter AG Op.].

In reaching her conclusion, the Nevada Attorney general first noted that sections 608.020, .030, and .040 were all adopted by the Nevada Legislature in 1919 and "created a set of general rules regarding the timing of the

payment of wages when employment ceases and when a penalty can be imposed if those general rules are breached." AG Op. She also noted that the Nevada Legislature adopted section 608.050 in 1925 and that the Nevada Supreme Court found section 608.050 to be an independent statute that did not amend the earlier laws. *Id.* citing (*Doolittle v. Eighth Judicial Dist. Court*, 15 P.2d 684, 685 (Nev. 1932)). She concluded that section 608.050 have a must [sic] different purpose from the prior laws. AG Op. Her examination of the statute led her to determine that section 608.050 added a condition that timing of payment could be controlled by a contract of employment. AG Op.

The Court agrees with the the [sic] Nevada Attorney General's analysis. One difference between section 608.050 and the earlier statutes is that it adds that the employees must be paid when their wages are due under the terms of their contract. When compared to the earlier rules, this suggests that for discharged and laid off employees the contract controls when they receive their final paycheck.

Plaintiffs, however, offer several reasons why the Nevada Attorney General's Opinion is incorrect.[4] First, Plaintiffs argue that the Opinion only discussed a layoff situation. Since Sands terminated its employees, section 608.040 governs. Plaintiffs overlook the fact that section

---

[4] Plaintiffs also dispute Sands' contention that Nev. Rev. Stat. § 608.070 allows the parties to agree to payment timing that is different from that outlined in section 608.040 and its progeny. The Court does not reach this issue because it has determined that section 608.050 allows the collective bargaining agreement to control.

608.050 also states that it applies to discharged employees. This Court has already determined that the employees in this case were discharged. The difference between section 608.040 and section 608.050 is the contract of employment provision. Sands' union employees were covered by a collective bargaining agreement, so section 608.050 governs.

Second, Plaintiffs argue that the Nevada legislature specifically states when parties can opt out of a law's provisions through a collective bargaining agreement. Since section 608.050 does not contain such opt out language, the collective bargaining agreement is not controlling. Sands points out that the Nevada Legislature enacted the prompt payment statutes prior to time when collective bargaining agreements were in prominent use because Congress had not passed the National Labor Relations Act. 29 U.S.C. § 151 (adopted in 1935). The opt out language is generally included in later statutes. *See e.g.* Nev. Rev. Stat. § 608.018 (2)(f) (added to the Nevada Revised Statutes in 1975). Therefore, the Court can not make any inference about the meaning of the absence of such language, and the Court agrees with Sands' argument. Also, the lack of opt out language does not contradict the fact the section 608.050 states that an employment contract controls.

Third, in a footnote, Plaintiffs complain that section 608.050 does not apply to a collective bargaining agreement because it states that a contract of employment governs timing. A collective bargaining agreement is different from a contract of employment because it does not give a person a job. However, the collective bargaining agreement is a binding agreement that governs the terms

and conditions of employment. Moreover, as discussed above, this statute was enacted before collective bargaining agreements were common. Now that collective bargaining agreements govern these issues, it is reasonable for the statute to also encompass their terms.

None of Plaintiffs' arguments persuade the Court that the Nevada Supreme Court would not adopt the reasoned opinion of the Nevada Attorney General. Section 608.050 allows a collective bargaining agreement to govern the timing of payment on termination. The original collective bargaining agreement between Sands and the Union provided that Sands would pay terminated employees on the next business day at the payroll office. (CBA ¶ 503.) Normally, Sands would have to give the employees their last paychecks on the next business day after June 30, 1996, the employees' final work day. However, the Memorandum of Agreement stated that "[h]ealth and welfare and other contractually mandated contributions or payments will extend through July 15, 1998, the date of termination for the affected employees/members." The Memorandum is a collectively bargained agreement, and it sets the termination date. The Court must interpret the original collective bargaining agreement in light of the Memorandum. *See Arizona Laborers v. Conquer Cartage Co.*, 753 F.2d 1512, 1518 (9th Cir. 1985) (explaining that courts consider subsequent conduct of the parties, other agreements, custom, and other surrounding circumstances when interpreting collective

bargaining agreements). Therefore, the Court must apply the date of termination as provided in the Memorandum.[5]

Plaintiffs contend that the above conclusion is incorrect. Plaintiffs point out that both the Nevada Attorney General and the Nevada Supreme Court referred to employment contracts entered prior to an employment relationship in their analysis of the prompt payment statutes. Plaintiffs reason that the parties agreed to the Memorandum after there was an employment relationship so it does not affect when Sands had to pay the employees. However, the statute does not specifically state that the agreement must be entered into before employment begins. Enforcing a later agreement like the one in this case is consistent with freedom of contract principles that the statute appears to espouse.

II. Conclusion

Having reconsidered the findings contained in its Order (#80) of May 14, 1998, the Court now finds that the Memorandum of Agreement between Sands and the Union is a binding obligation. Consequently, Sands can

---

[5] In the prior Order (#80), the Court stated that it was not clear whether the termination date as defined in the Memorandum also applied for the purposes of payment of final wages. However, in the prior Order, the Court was engaging in a waiver analysis. The Court could not find a clear waiver because Sands had sent a letter to the Union stating that it was not asking the union members to waive any rights. Waiver is no longer an issue because the statute allows the parties to set their own payment date. Therefore the letter than concerned the Court in its prior Order is no longer relevant to the timing of payment issue.

not deduct the severance it paid the union employees from its WARN Act damages. Also, after reconsidering the prompt payment provisions of Nevada law, the Court determines that section 608.050 allows a collective bargaining agreement to govern the timing of an employee's final paycheck. When read together, the CBA and the Memorandum do not require final payment until the next business day after July 15, 1996. Sands did not violate Nevada law as to the union employees because it paid the union employees their final wages on July 12, 1996.

IT IS THEREFORE ORDERED that Plaintiffs Local Joint Executive Board, Harvey McCoy, and Ron Byford's Motion for Reconsideration (#81) is GRANTED.

IT IS FURTHER ORDERED that the Court's Order (#80) dated May 4, 1998 is amended such that summary judgment is granted for the Plaintiffs as to the issue of an offset of severance pay for union employees.

IT IS FURTHER ORDERED that Sands' Motion for Reconsideration (#83) is GRANTED as to the union employees, but is DENIED as to the nonunion employees.

IT IS FURTHER ORDERED that the Court's Order (#80) dated May 4, 1998 is amended such that summary judgment is granted for Sands as to the issue of a violation of Nevada law as to the union employees.

DATED: August 13, 1998

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, an association of labor organizations comprising CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165, HARVEY McCOY and RON BYFORD, Plaintiffs, v. LAS VEGAS SANDS, INC., d/ba/ SANDS HOTEL CASINO, Defendant.	CV-S-96-000755-PMP (LRL) ORDER (Filed May 4, 1998)

Presently before the Court is Plaintiffs Local Joint Executive Board ("the Union"), Harvey McCoy, and Ron Byford's Motion for Partial Summary Judgment (#55) filed on November 12, 1997. Defendant Las Vegas Sands ("Sands") filed an Opposition (#66) on December 18, 1997. On December 24, 1997, Plaintiffs filed a Reply (#69).

Also before the Court is Defendant Sands' Motion for Summary Judgment (#62) filed November 20, 1997. Plaintiffs filed an Opposition (#69) on December 24, 1997. On January 20, 1998, Sands filed a Reply (#76).

I. Factual Background

Sands Hotel Casino closed its doors on June 30, 1996. On May 15, 1996, Sands notified its employees of the pending casino closing. Prior to its announcement, some of Sands' employees had heard rumors that the casino might close. These employees sent a letter to Sands on April 2, 1996, expressing their concerns about the rumors, but Sands never responded to that letter.

Sands announced severance payments for its non-union employees in a memorandum dated June 4, 1996. It also negotiated a severance package with the employees represented by the Union. During the negotiations, the parties had a misunderstanding about the Union employees' recall rights. Some Union employees felt that Sands was requiring them to give up their right to be recalled in order to obtain severance payments. On July 1, 1996, Sands' attorney wrote a letter to the Union's attorney stating that Sands was not seeking to deprive its employees of any of their legal or contractual rights. Sands and the Union signed a Memorandum of Agreement that described the severance package for Union employees on July 3, 1996.

The severance packages that Sands gave to the non-union and Union represented employees contained the same provisions. Because Sands only gave the employees forty five days notice, rather than the sixty days notice required by the Worker Adjustment and Retraining Notification Act ("WARN Act"), it was required to give the employees back pay for the fifteen day deficiency period. Sands consulted its attorney as to the amount of payment the WARN Act required. On the advice of its attorney,

Sands paid the employees their hourly wages for the working days within the fifteen day deficient period. Since its attorney found no cases requiring an employer to pay tips or holiday pay, Sands did not include tips, nor did it give the employees an extra day of pay for the Fourth of July holiday that fell within the deficiency period.

In addition to the WARN Act payments, Sands gave severance pay to its employees with over five years experience if they continued working at the Sands Hotel Casino until their end of service. For most employees their end of service was June 30, 1996, the day the casino closed. Sands paid all the employees prorated vacation pay, even though its policy was to only provide vacation pay to nonunion employees after they passed their anniversary date. Sands also hired career consultants to assist the employees in their job searches and kept its human resources department open after closing the hotel and casino to provide references.

Although Sands closed its doors on June 30, 1996, it did not pay the employees the payments provided in the severance packages until mid-July. Sands paid the employees for their last week of work, the last week of June, on July 12, 1996. It paid the accrued vacation pay on July 16, 1996, and the WARN Act payments on July 18, 1996.

II. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *Admiralty Fund v. Tabor*, 677 F.2d 1297, 1298 (9th Cir. 1982).

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The substantive law defines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is more than some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. *Id.* If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir.), *cert. denied*, ___ U.S. ___; 117 S. Ct. 181

(1996). If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, (1968), *reh'g denied*, 393 U.S. 901 (1968). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 250.

Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979), *reh'g denied*, 441 U.S. 968 (1979). Likewise, "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

The Supreme Court cases cited above establish that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp.*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). *See also Avia Group Int'l Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

III. Discussion

Plaintiffs seek summary judgment of claims related to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 (1994), and Nevada labor laws, Nev. Rev. Stat. §§ 608.020, .040, .050 (1997).

A. WARN Act

The WARN Act requires certain employers to give employees sixty days notice prior to the employer's business closing or a mass layoff. 29 U.S.C. § 2102. If the employer gives less than sixty days notice and does not fall within certain exceptions, the employee can sue for damages. 29 U.S.C. §§ 2101, 2103, 2104. The parties do not dispute that Sands notified its employees only forty five days before it closed the Sands Casino, thus triggering Sands obligation to pay damages to its employees.

The Plaintiffs allege that Sands violated the statute in the following ways: (1) Sands paid wages for working days instead of calender days, (2) Sands did not include tips in the wages it paid the employees, and (3) Sands did not give the employees holiday pay for the Fourth of July. In addition, Plaintiffs argue that Sands is not entitled to offset the damages it owes by severance payments or vacation payments paid to employees, nor is it entitled to a good faith defense. The Plaintiffs also contend that they are entitled to prejudgment interest. In its Motion for Summary Judgment, Sands argues that it paid all the damages it owed under the WARN Act.

1. Calender Days v. Working Days

Plaintiffs claim that Sands violated the WARN Act when it paid the employees wages for the working days in the deficiency period rather than the entire fifteen calender days. The WARN Act provides that an employer that does not give the entire sixty days notice is liable for "back pay for each day of violation." 29 U.S.C. § 2104(a)(1)(A). The Ninth Circuit Court of Appeals has not interpreted this provision, and the courts of appeal that have considered it have reached differing conclusions.

In *United Steelworkers v. North Star Steel Co., Inc.*, the Third Circuit Court of Appeals found that the WARN Act required an employer to pay damages for each calender day in a violation period. 5 F.3d 39, 41-43 (3rd Cir. 1993). The court began its analysis by examining the plain language of the statute according to the Supreme Court rule. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The court first noted that the Act specifically requires an employer to give sixty calender days of notice. *North Star Steel Co., Inc.*, 5 F.3d at 42. The court then concluded that the plain language also required damages for calender days because the Act never mentioned work days. *Id.*

The court rejected the argument that the words "back pay" before the "each day of violation" language created an ambiguity because back pay means a traditional lost earnings concept of damages by finding that such an interpretation would violate two rules of statutory construction. *Id.* First, a lost earnings interpretation would render 29 U.S.C. § 2104(a)(2)(A), which reduces damages

by wages paid by the employer to the employee for the violation period, superfluous because such a reduction would automatically occur in a lost earnings definition. *Id.* Second, a lost earnings concept would cause the provisions of the WARN Act to be inconsistent because lost earnings requires mitigation of damages by employees, while the WARN Act clearly does not. *Id.* at 43. The court concluded that back pay in this case was just a label for damages. *Id.* at 42-43.

Several district court decisions have agreed with the reasoning of the Third Circuit. *See Siniscalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182, 192 (D. Mass. 1995); *Joshlin v. Gannett River States Pub. Corp.*, 840 F. Supp. 660, 663 (E.D. Ark. 1993). The *Joshlin* court added that the WARN Act was not a make whole statute, but instead was a punitive statute. 840 F. Supp. at 663. According to the court, the added damages would effectuate the purpose of giving more notice. *Id.* at 664. Plaintiffs urge this Court to adopt the decision of the Third Circuit. They add that the extra damages are necessary to compensate them for consequential damages they suffered, like lost job opportunities.

Contrary to the Third Circuit, other courts have found that the WARN Act requires damages for only the working days of the violation period. *Saxion v. Titan-C-Mfg., Inc.*, 86 F.3d 553, 560-62 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 772 (10th Cir. 1995); *Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1286 (5th Cir. 1994). The *Dillard* court also began its analysis by looking at the language of the statute. However, the *Dillard* court determined that the language of 29 U.S.C.

§ 2104(a)(1)(A) was ambiguous because it has two potential meanings. The back pay portion implies a make whole or lost earnings damages provision because back pay "connotates a remedy that would require the payment of a sum such that the employees would be put in the same position they would have been had the violation never occurred." *Dillard*, 15 F.3d at 1283. At the same time, "for each day of violation" suggests that damages should be given for every violation day. *Id.* Since the court found the statute ambiguous, it examined the legislative history which stated that the damages consist of the wages the employees would have earned had the facility not closed. *Id.* at 1284. This meant that Congress intended the damages to be the traditional back pay remedy to make the employee whole, and thus, only included work days. *Id.* at 1285.

The *Dillard* court also disregarded the statutory construction problems cited by the *North Star* court. The *Dillard* court did not find 29 U.S.C. § 2104(a)(2)(A) to be superfluous because it would only apply in a layoff situation, not a closing. *Id.* at 1284 n.14. The court was also not concerned that the WARN Act did not require mitigation as there were reasons that Congress might not have wanted a totally remedial law such as simplicity or a lesser burden on employees. *Id.* In addition, the *Dillard* court noted that the working days solution was more equitable because it avoided a potentially anomalous result. *Id.* at 1285. Under the calender day approach, a employee who worked eight hours each day for five days a week would receive lower damages than an employee who worked one ten hour shift one day each week. *Id.*

(citing argument rejected in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 43 (3rd Cir. 1993)).

This Court agrees with the decision reached in *Dillard* that damages should be awarded for the working days in the violation period. Back pay has a well established meaning, and Congress did not indicate that it meant back pay to be used only as a label for damages. Therefore, when combined with the language that damages are available for each day of the violation, the provision is ambiguous, and the *Dillard* court was correct to examine the legislative history. The legislative history clearly demonstrates that Congress intended a traditional back pay remedy.

2. Tips

Plaintiffs also claim that Sands violated the WARN Act because Sands only paid the employees their hourly wages for the violation period and did not include tips that the employees would have earned had they continued working for the entire sixty days. This claim involves the same provision of the WARN Act as the claim relating to whether damages are owed for calender days or working days. The WARN Act requires that an employer that violates the act is liable for

> back pay for each day of violation at a rate of compensation not less than the higher of –
>
> > (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
> >
> > (ii) the final regular rate received by such employee

29 U.S.C. § 2104(a)(1)(A). No court has considered the issue of whether this provision requires the employer to pay for tips.

As with the calender versus working days issue, the interpretation of the damages provision begins with the plain language of the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). As above, the back pay language suggests that the employees should receive what they normally would have earned had the violation not occurred. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). The back pay award should include tips as tips are needed to make the employees whole. *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1348 (9th Cir. 1994).

However, Sands argues that the "regular rate of pay" language means that tips are not included in damages because the Department of Labor interprets regular rate of pay as the regular hourly or daily payments made by the employer to the employee. *See, e.g.* 29 C.F.R. § 531.60 (1997) (tips in excess of tip credit not included in regular rate of pay).[1] Sands reasons that the regular rate of pay definition supersedes the back pay definition because

---

[1] Sands also notes that when regular rate of pay is used in the collective bargaining agreement ("CBA") between Sands and the Union employees it implicitly means the hourly rate of pay. For example, vacation pay is based on the employee's current rate of pay. CBA § 11.04(a). However, even though the CBA can be used to clarify the meaning of the WARN Act, it can not be used to reduce WARN Act rights. 20 C.F.R. § 639.1(g) (1997). Therefore, if an employee has right to tips under a back pay definition, the fact that the CBA defines regular rate of pay as not including tips is not relevant.

otherwise the portion of 29 U.S.C. § 2104(a)(1)(A) referring to regular rate of pay would be superfluous. According to Sands, when the WARN Act states that back pay is at a rate of compensation not less than the average regular rate it is defining how back pay is calculated. If, back pay had its traditional meaning, the definition in the WARN Act would be unnecessary because traditional back pay already has a defined method of calculation.

Sands' position is incorrect. The part of 29 U.S.C. § 2104(a)(1)(A) that includes "regular rate" would not be superfluous. That portion ensures that an employer does not lower wages before closing the plant by requiring the back pay to be the higher of the average regular rate over the prior three years or the final regular rate. 29 U.S.C. § 2104(a)(1)(A). It would still be necessary if the regular rate included tips.

Given that the regular rate language would not be superfluous, the plain meaning of the damages provision is ambiguous. On the one hand, "back pay" would include tips. On the other hand, "regular rate" would not include tips. Therefore, the Court must examine the legislative history to determine the intent of Congress. Sands argues that back pay is merely used as a label in this provision and the lack of a mitigation requirement in the statue [sic] suggests that Congress intended a nontraditional meaning of back pay. However, this Court agrees with the *Dillard* court that Congress intended the damages provision to follow the traditional back pay definition.

Sands maintains that decision in *Dillard* does not compel the conclusion that tips are included in damages. Sands agrees that *Dillard* said that back pay meant a lost

earnings damages rule. However, since the *Dillard* court did not consider the impact of that reasoning on the tips issue, Sands argues that back pay should be interpreted to clarify the "each day of violation" language for the calender day versus working day issue, but should not be interpreted as requiring tips. Sands argues that Congress' statement that the damages provision was intended to act as simplified liquidated damages supports this interpretation. S. Rep. No. 100-62, at 24 (1987). The Court disagrees.

The Senate Report stated that the damages for the WARN Act should be measured by the wages an employee would have earned had the violation not occurred. *Id.* This is clearly a traditional back pay definition. In essence, Sands wants the Court to adopt the result of *Dillard*, but not the reasoning. Congress probably was not directly considering the issue of tips when it enacted the WARN Act as there are most likely few business with over 100 tipped employees. Still, Congress did contemplate a make whole type remedy. Therefore, it makes sense to include tips in the employees' damages.

Sands makes one other argument to persuade the Court to disregard the legislative history of the WARN Act. Sands argues that including tips in damages is unfair to employers of large numbers of tipped employees. Other employers can choose to pay damages in lieu of giving notice without negative effect because their payroll expenses stay the same, while employers of tipped employees would have an increased payroll expense if they made the same choice.

Sands neglects to mention that not including tips would be unfair to the employees. Nontipped employers would receive the same amount of money if the employer gave full notice or gave damages instead of notice, while tipped employees would receive less money if the employer chose to give damages. Sands position that it is not unfair to the employees because they are getting what amounts to an unexpected vacation is not persuasive because some employees would undoubtedly prefer to stay on the job and make tips. Some unfairness will result for one party whether or not tips are included. If tips are included in damages, the employer can control if it has to pay unfair extra expenses. On the contrary, if tips are not included the employees have no control over whether or not they will receive less money. Therefore, the Court finds it more equitable to include tips in damages.

Sands does not offer a persuasive reason for this Court to disregard legislative history indicating that Congress intended the WARN Act to include a traditional back pay remedy. Therefore, Sands owes its former employees tips for the violation period. Given this finding, the Court does not need to address Plaintiffs other arguments that they are entitled to tips.

3. Holiday Pay

Plaintiffs contend that they are entitled to an extra day of back pay for the Fourth of July holiday that occurred during the violation period. Under the CBA, Sands' employees were paid a day's wages if they did not work on a holiday or double a day's wages if they did

work the holiday. Sands provided the same holiday benefits to nonunion employees. Sands contests the Plaintiffs' position, arguing that Plaintiffs do not qualify for any extra pay since they did not work on the holiday.

This Court already determined that Congress intended a traditional "make whole" type back pay remedy for violations of the WARN Act. Under such a remedy, employees are entitled to what they normally would have earned had the violation of the Act not taken place. *Phelps Dodge Corp. v. NLRB*, 313 US 177, 197 (1941). Back pay has been held to include holiday benefits. *See Van v. Plant & Field Serv. Corp.*, 672 F.Supp. 1306, 1319 (C.D. Cal. 1987) (discussing back pay under Title VII), *aff'd* 872 F.2d 432 (9th Cir. 1989). Therefore, Plaintiffs are entitled to holiday pay for the Fourth of July if they would have earned an extra day's pay had Sands given the entire sixty days notice.

4. Offsets

Sands claims that it is entitled to deduct severance payments and vacation payments it made to its employees from the damages it owes for not compensating them for lost tips and holiday pay. If a court finds an employer liable under the WARN Act, the employer is allowed to deduct from the damages "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104 (a)(2)(B)

a. Severance Payments

Sands argues that it voluntarily provided severance payments to its employees with over five years experience. Therefore, the Court should deduct those payments from its WARN Act damages. The Plaintiffs counter that Sands entered into a unilateral contract with the employees so it was legally required to pay the severance benefits, and therefore, Sands should not be able to deduct the benefits.

Initially, this Court must resolve whether the determination of Sands' legal obligation to provide severance pay is governed by state law or preempted by the Employee Retirement Income Securities Act ("ERISA"). Some courts find that the ERISA preempts state law claims because a severance package is an employee benefit plan. *See Tobin v. Ravenswood Aluminum Corp.*, 838 F. Supp. 262, 268 (S.D.W. Va. 1993). However, the Ninth Circuit Court of Appeals held that a severance package is only an employee benefit plan under ERISA if is [sic] involves an ongoing administrative scheme. *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1316 (9th Cir. 1997). The severance packages offered by Sands are much like the one in *Velarde*. They require a simple calculation to determine the benefit, and therefore, are not benefit plans. *Id.* Consequently, the issue is not preempted and Nevada law governs.

i. Nonunion Employees

Sands distributed a memorandum announcing severance pay for its nonunion employees on June 4, 1996.

(Pls.' Ex. C.) The memorandum explained that Sands would give severance pay to employees who had over five years experience and who were not covered by a separate severance agreement. The payments were subject to the employees remaining employed through the end of service, which was June 30, 1996 for most employees. (Pls.' Ex. C.) The memorandum specifically stated that it did not apply to bargaining unit employees. (Pls' Ex. C.) Plaintiffs contend that this memorandum and the employees continued work creates a legally binding contract for payment of the severance benefits.

Under general contract law, "[t]he offer by one party of specified compensation for the performance of a certain act . . . constitutes a promise by the offeror." *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961). The offeree's performance of the act is consideration, and an enforceable contract results. *Id. Other courts have applied the above principles to the employment context. For example, in Chinn v. China Nat'l Aviation Corp.*, the employer enacted regulations that provided for severance pay. 291 P.2d 91, 92 (Cal. Ct. App. 1955). The court found that remaining on the job after the regulations were promulgated constituted an acceptance, and the employee was entitled to the benefits. *Id.* at 94. The conclusion in *Chinn* is further supported by the following Restatement of Contracts illustration:

> In January A, an employer, publishes a notice to his employees, promising a stated Christmas bonus to any employee who is continuously in A's employ from January to Christmas. B, an employee hired by the week, reads the notice and continues at work beyond

> the expiration of the current week. A is bound by an option contract, and if B is continuously in A's employ until Christmas a notice of revocation of the bonus is ineffective.

Restatement (Second) of Contracts § 45 cmt. d illus. 8 (1981).

The current case closely mirrors the Restatement example. Sands made an offer to its employees when it posted the notice offering severance pay if the employees worked until the closing date. The employees accepted by continuing to work, and their continued work was consideration. Therefore, Sands and the employees had a valid contract, and Sands was legally obligated to provide severance payments.

Sands makes several arguments that the above conclusion is incorrect. Sands' first argument is that is [sic] did not intend to make a contract. Sands contends that it was only telling its employees about its voluntary severance package. Sands even offers extrinsic evidence of this voluntary intent. (Prunty Aff. ¶ 3.) There are several problems with this argument. First, in order to contradict the offer of a unilateral contract that occurred when Sands posted the severance package memorandum, Sands would need to manifest an intent not to form a contract. Restatement (Second) of Contracts § 45 cmt. b (1981); *James Hadie Gypsum (Nevada) Inc. v. Inquipco*, 929 P.2d 903, 906 (Nev. 1996) (finding that objective manifestations of intent are necessary to find a contract). No where did Sands objectively indicate that it did not intend to form a contract. Sands subjective intentions are not relevant. Second, a meeting of the minds depends on external signs. *Hotel Riviera, Inc. v. Torres*, 632 P.2d 1155,

1157 (Nev. 1981). Sands now argues that there was no meeting of the minds, but the external signs do not show any disagreement. Third, extrinsic evidence of intent is not needed to interpret an unambiguous contract. *Crow-Spieker #23 v. Robinson*, 629 P.2d 1198, 1199 (Nev. 1981). The contract for severance pay was unambiguous. Sands extrinsic evidence of intent is not relevant.

Sands also makes several additional arguments as to why it should not be legally obligated to pay severance. First, it states that it did pay severance to some employees that left before the closing date. However, its obligation to pay those employees was entirely within its discretion. (Pls.' Ex. C.) Sands' payments to some employees who left early does not detract from the fact that Sands made an offer to the employees to pay them if they stayed through the closing. Second, Sands argues that finding that it made a contract would create a situation where an employer could never tell its employees of voluntary benefits. This argument is without merit. The employer could simply offer a disclaimer or give the benefits to the employees without comment.

Finally, Sands maintains that the Court should interpret the WARN Act to prohibit offsets only for pre-existing legal requirements. Under this argument, the requirement to pay severance benefits would need to pre-exist the closing announcement or it would reduce damages. As support for its position, Sands cites the following portion of the House Report: "The offset provision also would apply if an employer offers employees a payment (in the absence of any legal obligation), in a voluntary and unconditional effort to ease the burden of termination or simply as a gesture of good will." H.R.

Conf. Rep. No. 100-576 (1988). Neither the WARN Act nor the above portion of the House Report state that the obligation must exist prior to the closing. This argument is without merit.

Sands entered into a contract to nay severance benefits to nonunion employees when it offered the benefits of the employees worked through the closing date and the employees accepted by continuing to work. None of Sands' arguments change this result. Therefore, since Sands had a legal requirement to pay severance to nonunion employees, this Court will not use those benefits to reduce the damages Sands owes.

ii. Union Employees

The Union employees' severance package situation is somewhat different than the nonunion employees' situation. Sands could not simply distribute a memorandum, but instead had to bargain with the Union over the severance benefits. On July 3, 1996, the Union and Sands entered into an agreement concerning severance pay. (Pls.' Ex. D.) The agreement contained language identical to the language in the memorandum given to the nonunion employees. Severance payments were going to be given to the employees provided that they worked through their end of service date.

The Plaintiffs' position is that the legal ramifications of the Union agreement is the same as the memorandum given to nonunion employees because Sands also entered into a contract with the Union employees when it signed the agreement. However, in this case the casino had

already closed and the employees had already finished working. Unlike for the nonunion employees, the Union employees could not accept or offer consideration by continuing to work. "A benefit conferred or detriment incurred in the past is not adequate consideration for a present bargain. *Clark County v. Bonanza No. 1*, 615 P.2d 939, 943 (Nev. 1980) (citing *Smith v. Recrion Corp.*, 541 P.2d 663 (Nev. 1975)). Since there was inadequate consideration, the agreement was not an enforceable contract. Sands was not legally obligated to provide severance payments to Union employees, and the payments can be deducted from damages.

The Court recognizes that allowing a deduction for Union employees and not allowing a deduction for nonunion employees creates an anomalous result. However, the Union employees were represented during the negotiations. They chose the protection of the Union. The Union opted to continue negotiating for other potential benefits rather than agree to severance payments at a time that might have resulted in an enforceable agreement.

b. Vacation Payments

In addition to severance payments, Sands paid its employees prorated vacation benefits. The CBA between Sands and the Union provided that Sands would prorate vacation pay to Union employees upon termination. (CBA § 11.05, Pls.' Ex. A). Sands does not dispute that it had a legal obligation to prorate vacation pay for Union employees. Therefore, the vacation payments to Union employees will not be deducted from damages. Sands

does dispute whether it had a legal obligation to prorate vacation benefits for nonunion employees.

Sands reasons that it was not required to prorate benefits at closing because Sands' vacation policy for nonunion employees provided that vacation pay was only payable after an employee reached the anniversary date of his or her hiring. (Prunty Dep. p. 32.) The Plaintiffs counter that many courts hold that employers still must prorate the benefits because it is the employer's fault that the employee can not reach the anniversary date. Sands contends that no Nevada case has held that employers are liable for prorated vacation pay and that vacation payments are not included as wages under Nevada statutes. Accordingly, Sands maintains it is not required to give nonunion employees prorated vacation pay.

Sands is correct that federal courts look to state law to determine if an employer is legally obligated to prorate vacation pay. *Jones v. Kayer-Roth* [sic] *Hosiery, Inc.*, 748 F. Supp. 1292, 1300-01 (finding employer not obligated because prior Tennessee case held that employee must meet anniversary date if the employer's policy is clear), *amended by*, 753 F. Supp. 218 (E.D. Tenn. 1990) (amending to allow actuarial cost of weekly disability benefits). Sands is also correct that Nevada has not addressed the present issue. However, Nevada's lack of law does not end the inquiry as suggested by Sands. Instead, this Court must determine how Nevada would answer this question if confronted with it. A federal court must use its own best judgment in predicting how the state's highest court would decide the substantive issue. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *reh'g*

denied. modified, 810 F.2d 1517 (1987); *Takahashi v. Loomis Armored Car Service,* 625 F.2d 314, 316 (9th Cir. 1980). In performing that function, this Court may be aided by reviewing well-reasoned decisions from other jurisdictions. *Takahashi,* 625 F.2d at 316.

Nevada law does require employers to pay employees their wages and compensation due if they are discharged, resign or quit. Nev. Rev. Stat. §§ 608.020-030. Wages are defined as "[t]he amount which an employer agrees to pay an employee for the time the employee has worked." Nev. Rev. Stat. § 608.012. They include commissions owed, but not bonuses or profit sharing. *Id.* According to Sands, the employer does not have to pay for prorated vacation because vacation pay is not included in the definition of wages. This interpretation has some support. Damages for failure to pay the earned wages are the wages or compensation at the same rate. Nev. Rev. Stat. § 608.040. A 1955 opinion of the Nevada Attorney General concluded that those damages did not include vacation pay. 60 Op. Nev. Atty. Gen. (1955). Since damages consist of wages, wages do not include vacation pay.

However, the opinion of the Attorney General is not binding, and the Court concludes that the Nevada courts, if confronted with the issue, would adopt the more modern view that vacation pay is a form of deferred wages. *Local Union No. 186. United Packinghouse Food & Allied Workers v. Armour & Co.,* 446 F.2d 610, 612 (6th Cir. 1971); *Suastez v. Plastic Dress-Up Co.,* 647 P.2d 122, 126 (Cal. 1982). In fact, arbitrators dealing with these issues in Nevada have concluded that vacation pay is delayed wages. *Las Vegas Joint Executive Board v. Caesars Palace* (Oct. 22, 1985) (Zigman, Arb.) ("[T]he arbitrators

accepted the principle of deferred earnings as one basis for prorating the vacations."); *Fremont Hotel v. Culinary Workers Union Local 226* (June 21, 1968) (Block, Arb.) (finding that interpretation of contract gap that employees should get prorated vacation was consistent with the accepted principle that vacation are deferred earnings). If vacation pay is deferred wages, then the employees have earned that pay even if they have not reached their anniversary date. The Nevada courts would require Sands to pay the portion of vacation pay that the employees earned at closing. Nev. Rev. Stat. §§ 608.020-030.

Even if Nevada would not conclude that vacation payments are wages, but instead are an inducement to continue working, Nevada courts would still require Sands to give prorated vacation pay under contract law principles. *See Suastez*, 647 P.2d at 127. Under Nevada law, "any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract." *Cladianos v. Friedhoff*, 240 P.2d 208, 210 (Nev. 1952). When that principle has been applied to the condition that employees meet certain dates for vacation pay, Several courts find that the condition is excused when the Employer makes performance impossible by closing the place of employment. *Armour & Co*, 446 F.2d at 614; *Suastez*, 647 P.2d at 127. This Court that finds Nevada courts would adopt such an approach as it is consistent with its general contract law and provides a fair result.

In this case, it is Sands fault that the employees were not able to meet their anniversary date. Therefore, under Nevada law Sands would be required to prorate their

vacation pay. Since Sands is required to give the payments, the payments can not be used to reduce Sands' damages under the WARN Act.

5. Good Faith Defense

Sands maintains that even if it is liable for damages for violating the WARN Act, it is entitled to a reduction in damages because it acted in good faith. Plaintiffs argue that good faith is not available to an employer that knowingly violates the Act by giving less than sixty days notice. Alternatively, Plaintiffs contend that Sands did not act in good faith when it calculated the damages it owed its employees.

The WARN Act states:

> [i]f an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided in this section.

29 U.S.C. § 2104(a)(4). The statute requires two elements. First, the employer must provide evidence of the objective reasonableness of its application of the WARN Act. *Frymire v. Ampex Corp.*, 61 F.3d 757, 767-68 (10th Cir. 1995). Second, the employer must prove that it had the subjective intent to comply with the WARN Act. *Id.* In addition, a court should construe the good faith defense narrowly. *Washington v. Aircap Indus., Inc.*, 860 F.2 [sic]

Supp. 307, 315 (D.S.C. 1994) (citing *Olsen v. Lake Country, Inc.*, 955 F. 203, 206 (4th Cir. 1991)).

The Plaintiffs first argue that the Court does not even need to consider whether Sands met the two elements. According to Plaintiffs, when an employer knows that it is giving inadequate notice and knows that it does not fit within on the Act's exceptions for reduced notice, it can not seek a reduction for good faith because the employer can not reasonably believe that its act did not violate the law. 29 U.S.C. § 2104(a)(4).

While Plaintiffs argument has logical appeal based on an inspection of the good faith provision, an examination of the entire Act reveals that the WARN Act was set up to allow employers to pay damages in lieu of notice. If an employer gives inadequate notice, but then give [sic] employees the required back pay, it has no liability. Other provisions of the Act support a damages in lieu of notice concept. For example, employers are subject to a civil penalty of $500 per day if they do not notify local government sixty days before a shutdown. 29 U.S.C. § 2102(a)(2); 29 U.S.C. § 2104 (a)(3). However, the civil penalty does not apply if the employer pays the employees the required damages within three weeks of the closing. 29 U.S.C. § 2104 (a)(3). Finally, the house Report noted that the WARN Act might be more appropriately called the severance in lieu of notice act. H. Rep. No. 100-285, at 16 (1987). The Report specifically noted that employers could chose various damages and notice mixtures to best suit their needs. *Id.*

Since Congress designed the WARN Act to allow damages instead of notice, the employer should be able to

use a good faith defense when it violates the Act, but pays damages. In fact, courts have considered good faith defenses when an employer paid damages. *See Carpenters Dist. Council v. Dillard Dep't. Stores, Inc.*, 15 F.3d 1275, 1287-88 (5th Cir. 1994).

An employer like Sands that knowingly gives less than sixty days notice must prove that it meets the good faith requirements for its damages calculations. First, Sands must provide evidence that its interpretation of the Act was objectively reasonable. Sands maintains that its interpretation of whether the WARN Act rquires tips and holiday pay is reasonable given the uncertainty concerning the law. The Court agrees that a reasonable person could objectively determine that the Act did not require tips and holiday pay given the lack of case authority and the use of "regular rate of pay" in the Act.. Therefore, Sands meets this requirement.

In addition to proving objective reasonableness, Sands must prove that it subjectively intended to follow the WARN Act with respect to the tips and holiday pay issues. Although the determination of subjective good faith is necessarily fact specific, the Fifth Circuit Court of Appeals has noted that it can be shown by evidence of specific intent and "general evidence that that th company had its employees' welfare in mind." *Frymire*, 61 F.3d 768.

Sands contends that it has evidence of its specific intent to comply with the WARN Act because it consulted an attorney about the Act's requirements. *See Frymire*, 61 F. 3d at 768. However, courts have held that parties can not necessarily insulate themselves from liability just by

consulting an attorney about the Act. *Washington*, 860 F. Supp. at 318. One district court found that an attorney must have engaged in some analysis and have a reasonable basis for his or her opinion for the party to be able to prove subjective good faith. *See United Paperworkers Int'l Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 443 (D. Mass. 1995).

In this case, Sands' attorney looked for cases discussing whether damages under the WARN Act included tips or holiday pay. Finding none, Sands' attorney concluded that the Act did not require those payments. Sands admits that its attorney did not consult other labor or employment law cases to see how those cases treated the tips or holiday pay issue. Also, although Sands agreed with the cases finding that the WARN Act only required damages for working days, it did not import the analysis of those cases to the tips and holiday pay issue. The Court can not determine if Sands' attorney gave Sands any type of written analysis or detailed oral explanation for the conclusion that the Act does not require tips and holiday pay. Although the attorney's performance was not entirely deficient because the attorney did look for cases, in an unclear area of law the attorney and Sands should have known that the Court would have to base its decision on other labor law cases or on a reasoned analysis of the policies behind the Act. Sands can not show evidence of subjective good faith by basing a decision affecting numerous employees on an analysis that stated that tips and holiday pay are not required because no cases hold that they are required.

Sands also states that it always had the general welfare of its employees in mind. It hired career counselors

to assist its employees in finding new jobs, it held job fairs, and it kept its human resources department open after closing the hotel and casino to provide references. Still, there is the possibility that Sands was not entirely concerned with its employees welfare. Sands gave its employees notice that the casino would close on May 15, 1996. If it had known for some time prior to that date that it would close the casino and it [sic] not inform its employees, then that is evidence that Sands was not always concerned with its employees. Even though such an act would be allowed under that Act as long as the employer paid proper damages, it would still be evidence of subjective bad faith. *See, e.g. Dillard*, 15 F.3d at 1287 (finding that employer could not meet subject good faith when employer knew it was within sixty day notice period when discussed WARN Act requirements, but did not give sixty days notice and did not rely on exceptions). When Sands decided to close the casino is not clear, and the parties stipulated to an order stopping discovery on that issue until after the Court decided the summary judgment motions. (Aug. 8, 1997 Stipulation).

This Court can not make a determination of subjective good faith based on the facts before it. While there is evidence that Sands was concerned with the welfare of its employees, its reliance on an incomplete opinion of counsel undercuts that general concern. Moreover, this Court does not have adequate information to determine if Sands knew it would close the hotel and casino prior to its announcement of the closing to its employees. Therefore, the Court will wait to determine this issue until the parties provide additional evidence relating to Sands'

subjective good faith, specifically its concern for its employees welfare.

6. Prejudgment Interest

Courts have held and the parties do not contest that prejudgment interest is allowed under the WARN Act. *Frymire v. Ampex Corp.*, 61 F.3d 757, 772-73 (10 [sic] Cir. 1995); *Carpenters Dist. Council v. Dillard Dept. Stores. Inc.*, 15 F.3d 1275, 1288 (5h [sic] Cir. 1994). The cases found that prejudgment interest could be granted pursuant to 28 U.S.C. § 1961, and it would further the purpose of the WARN Act. *Frymire*, 61 F.3d at 773; *Dillard*, 15 F.3d at 1288. Even so, Sands claims that the Court should not award prejudgment interest in this case because it acted in good faith and made substantial efforts to comply with the Act. However, the Court determines that prejudgment interest is appropriate in this case because it serves the compensatory or make whole purpose of the WARN Act. *See Frymire*, 61 F.3d at 774. The Plaintiffs should have received the tip money and holiday pay when the casino closed. Prejudgment interest compensates the Plaintiffs for the delay.

B. Nevada Law

The Plaintiff [sic] also claim that Sands violated Nevada labor laws requiring prompt payment of earned compensation to discharged employees. Nev. Rev. Stat. § 608.020 provides that "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall

become due and payable immediately." If an employer does not pay a discharged employee within three days of when payment is due, "the wages or compensation of the employee continues at the same rate from the day he . . . was discharged until paid or for 30 days, whichever is less." Nev. Rev. Stat. § 608.040. Nev Rev. Stat. § 608.050 similarly provides that an employer must pay wages due to employees at discharge or layoff or the employees can continue to collect wages.

The Plaintiffs claim that Sands violated the above laws because the Plaintiffs stopped working by June 30, 1996, when the casino closed, but were not paid until mid-July. Sands counters that it did not violate Nevada law because July 15, 1996, was the termination date for both nonunion and Union employees. Only the payments for the last week of June and the accrued vacation pay are at issue because the WARN Act payments and the severance payments were not earned by June 30, 1996, and thus, were not due by June 30, 1996.

1. Nonunion Employees

Even though the nonunion employees did not work after June 30, 1996, Sands argues that they were not discharged until July 15, 1996, because it continued to pay wages until that date. According to Sands, there was still an employment relationship between it and the employees until it stopped paying wages. The plaintiffs counter that according to common law, the nonunion employees and Sands were no longer in an employment relationship after the casino closed.

The Nevada Supreme Court held that in order to determine if two parties are in an employment relationship, courts must look to the economic reality of the relationship. *Prieur v. D.C.I. Plasma Center, Inc.*, 726 P.2d 1372, 1373 (Nev 1986). The Ninth Circuit Court of Appeals has looked to four factors when considering the economic reality of an employment relationship. *Bonnette v California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). These factors include " 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.' " *Id.* (citing the district court opinion). The main question is whether the employer can control the employees' actions. *Maka v. U.S. I.N.S.*, 904 F.2d 1351, 1361 (9th Cir. 1990), *amended by* 932 F.2d 1352 (9th Cir. 1991).

Sands maintains that it meets the four factors, and therefore, was in an employment relationship with the nonunion employees until July 15, 1996. First, Sands states that it could hire or fire the employees until July 15, 1996, when it chose to terminate them. Firing an employee means that an employer no longer has an obligation to pay the employee, except for work the employer has already performed. In this case, Sands would have to pay the employees for the first two weeks of July even if they "fired" the employees before July 15, 1996, because the WARN Act required the payments. Therefore, Sands could not fire the employees. Second, Sands claims that it exercised control over the employees by telling them not to come to work. This factor relates to the terms and

conditions of employment. This means that an employer tells an employee when to come in to work and what to do. Sands did not control the employees. The casino was closed. Third, Sands states that it determined the rate of compensation. This is not true because after June 30, 1996, the WARN Act dictated how much Sands had to pay the employees. Fourth, Sands states that it maintained employee records through July 15, 1996. This may be true, but it does not counteract the fact that Sands fails the other three factors.

According to the common law, Sands was no longer in an employment relationship with the Plaintiffs after June 30, 1996. Sands raises one additional argument to prove an employment relationship. Under Nevada law, an [sic] person can not get unemployment compensation if that person is receiving severance or vacation pay. Nev. Rev. Stat. §§ 612.420, .430. Sands argues that those statutes mean that such a person is still employed under Nevada law. However, the unemployment laws do not mean that such people are still considered employed. The Nevada Legislature might have decided that people getting severance or vacation pay do not need unemployment compensation, even if they are not employed. Therefore, this argument does not support Sands' conclusion that it was still in an employment relationship with the Plaintiffs.

In addition to arguing that it was still in an employment relationship with the Plaintiffs after June 30, 1996, Sands argues that the purpose of the Nevada laws suggests that it should be able to pay the employees after the closing date. Sands contends that the purpose of the laws is to make sure that the employees get paid. Since Sands

still had some kind of a relationship with its employees after closing, the employees did not have to worry that they would not be paid. Therefore, Sands could pay two weeks after closing. The Plaintiffs counter that the purpose of the laws is to provide workers with some immediate money after they lose their jobs in order to cushion the blow of unemployment. Therefore, Sands should have paid the employees at closing. Since both of these purposes are plausible, the Court finds that the purpose of ensuring payment does not negate the clear mandate in the Nevada laws that Sands pay its employees upon termination.

Sands is trying to get out of its legal obligation under Nevada law by relying on two weeks of compensation that the WARN Act required to provide to its employees. Sands was no longer in an employment relationship with its employees as of June 30, 1996. Sands should have paid the employees their wages for the last week of June and their accrued vacation pay on that date.

2. Union Employees

Sands also claims that its Union employees were not terminated until July 15, 1996 so it was not obligated to pay them until that date. This Court has already determined that Sands was no longer in an employment relationship with its employees after it closed the casino on June 30, 1996. However, Sands claims that the Union employees waived their right to be paid at the closing date.

a. Standing

This Court must determine whether the Union has standing to bring this claim before it can address the merits. The Court denied a motion by the Plaintiffs to certify the Union as a class representative for the Nevada law claims (#61). When it denied the Motion, the Court did not clarify whether it considered the Union to have associational standing to bring the state law claims.

An organization must meet the following three requirements in order to have standing bring claims of its members: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

The first requirement of associational standing is that members of the organization have standing. Standing requires "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751 v. Brown Group Inc.*, 517 U.S. 544, 116 S. Ct. 1529, 1533 (1996). The individual union members have an injury because they did not get paid when Sands terminated their employment. The challenged conduct is Sands not paying them promptly and that caused their injury. A favorable decision by this Court will redress their injury because Sands will be required to pay damages for its

delay in payment. Therefore, the members of the Union would individually have standing.

The second requirement of associational standing is that the interests the Union wants to protect are relevant to its purpose. The Union is seeking to protect its member's work related right to prompt pay, and unions are formed to protect their members' work related interests. Therefore, Sands meets this requirement.

The third requirement of associational standing is that the [sic] neither the claim asserted nor the relief requested can require the participation of the organization's individual members. Generally, this requirement is not met when the Union seeks monetary damages because such damages would require each member to participate. *Brown Group, Inc.*, 116 S. Ct. at 1535; *United Union of Roofers, No. 40 v. Insurance Corp. of America*, 919 F.2d 1398, 1400 (9th Cir. 1990). Plaintiffs are requesting monetary damages for Sands failure to pay the employees' earned wages and vacation pay at closing.

However, the Supreme Court held that the third prong of the associational standing test is a prudential requirement, not a constitutional requirement. *Brown Group*, 116 S. Ct. at 1535 (allowing union to sue under WARN Act when statute provided for union suits). According to the Supreme Court, the third prong's main purpose is administrative convenience. *Id.* at 1536. In this case, the Union is already allowed to sue for the WARN Act claims. The damages under Nevada law, an extra two weeks compensation, are likely to be the same or similar to the damages under the WARN Act. Therefore, it is not inconvenient to allow the Union to sue for the Nevada

law claims because the individual members are already participating in relation to the WARN Act claims. The Union has standing to bring these claims as it meets all the associational standing requirements.

c. Waiver

The Memorandum of Agreement between Sands and the Union stated that "[h]ealth and welfare and other contractually mandated contributions or payments will extend through July 15, 1996, the date of termination of employment for the affected employees/members." Sands maintains that this language means that the Union members agreed that they were terminated on July 15, 1996. Accordingly, Sands argues that the Union members waived payment on June 30, 1996, because the Nevada laws take effect on termination.

Both Sands and the Plaintiffs argue in their pleadings about whether the Union can waive its members rights in this context. The Court, however, finds that it does not need to determine that issue. The Supreme Court has held that even if the waiver of a statutory right by a union is permissible, the waiver must be clear and unmistakable to be effective. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (waiving provisions of NLRA); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 n.9 (1988). This waiver fails that test.

First, although the language in the agreement states the termination date, it does not explicitly state that the members are agreeing to later payment. The context of how the word "termination" is used in the agreement

would not lead anyone to think that the parties were referring to a payment date. In that paragraph of the agreement, the termination date referred to how long Sands had to make contractually obligated payments. Also, Sands sent a letter to the Union's attorney stating that they were not asking the Union members to waive any legal rights. Sands claims that the letter was referring to a dispute over recall rights, but the letter does not state what dispute it was discussing. In fact, the letter explicitly said that the employees were not required to waive *any* right. At the very least, the letter further confuses whether the employees were waiving their rights and makes it impossible for the language in the agreement to be a clear and unmistakable waiver of the Union members' state law rights.

IV. Conclusion

The Court finds that Sands is liable under the WARN Act for the tips and holiday pay it did not give its employees. It is not liable for back pay for every calender day of the violation period. Sands is not entitled to offset its liability for the severance pay provided to nonunion employees or for accrued vacation pay. However, Sands may offset its liability for the severance pay provided to Union employees. The remaining WARN Act issues before the Court are the amount of damages and the possibility of an offset for Sands' good faith. The Court will determine whether its will reduce Sands' liability for its good faith compliance with the WARN Act after the parties provided additional information concerning Sands subjective good faith. The Court will also award

prejudgment interest to the extent the Plaintiffs' damages are not reduced by the good faith defense. In addition, Sands is liable to the Plaintiffs for its failure to pay the Plaintiffs for their last week of work and their accrued vacation pay at the time of termination.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Partial Summary Judgment (#55) is GRANTED as to the following issues: tips, holiday pay, severance pay for nonunion employees, accrued vacation pay, prejudgment interest, and Nevada law claims for prompt payment of the employees' last week of compensation and accrued vacation.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment (#55) is DENIED as to the following issues: calender days v. working days, severance pay for Union employees, and Sands' good faith defense.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (#62) is GRANTED as to the following issues: calender days v. working days and severance pay for Union employees.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (#62) is DENIED as to the following issues: tips, holiday pay, severance pay for nonunion employees, accrued vacation pay, prejudgment interest, Nevada law claims for prompt payment of the employees' last week of compensation and accrued vacation, and Sands' good faith defense.

DATED: May 4, 1998

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF CULINARY/ BARTENDER TRUST FUND; BARTENDERS UNION, LOCAL 165; CULINARY WORKERS UNION, LOCAL 226; HARVEY MCCOY; RON BYFORD, Plaintiffs-Appellants, v. LAS VEGAS SANDS, INC., dba Sands Hotel Casino, Defendant-Appellee.	No. 98-17065 D.C. No. CV-96-00755-PMP/LRL

LOCAL JOINT EXECUTIVE BOARD OF CULINARY/ BARTENDER TRUST FUND; BARTENDERS UNION, LOCAL 165; CULINARY WORKERS UNION, LOCAL 226; HARVEY MCCOY; RON BYFORD, Plaintiffs-Appellees, v. LAS VEGAS SANDS, INC., dba Sands Hotel Casino, Defendant-Appellant.	No. 98-17322 D.C. No. CV-96-00755-PMP/LRL **ORDER** (Filed May 18, 2001)

Before: KOZINSKI, FERNANDEZ, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed on April 25, 2001.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
SEP 10 2001
CLERK

(2)

No. 01-288

In The Supreme Court of the United States

LAS VEGAS SANDS, INC., d/b/a SANDS HOTEL CASINO
PETITIONER,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226,
BARTENDERS UNION, LOCAL 165;
HARVEY MCCOY; RON BYFORD,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

RICHARD G. MCCRACKEN
Counsel of Record
McCracken, Stemerman,
Bowen & Holsberry
1630 S. Commerce Street
Suite A-1
Las Vegas, Nevada 89102
(702) 386-5107

Attorneys for Respondents

ALLIED PRINTING TRADES LABEL COUNCIL SOUTHERN CALIF 133

18pp

QUESTIONS PRESENTED

1. May an employer obtain a credit against its liability under the Worker Adjustment Retraining and Notification ("WARN") Act for severance payments which it was otherwise legally obligated to make?

2. Are tips properly included within "back pay" due under the WARN Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Association v. Western Pulp & Paperworkers v. Grays Harbor Paper Co., 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. 1994) 3

Boilermakers v. Allsteel, 9 F. Supp. 2d 901 (N.D. Ill. 1998) 3

Breedlove v. Earthgrains Baking Cos., Inc., 140 F.3d 797 (CA 8 1998), cert. denied, 525 U.S. 921 (1998) 2

Burns v. Stone Forest Industries, 147 F.3d 1182 (CA 9 1998), cert. denied, 525 U.S. 1040 (1998) 2

Carpenters District Council v. Dillard Department Stores, 15 F.3d 1275 (CA 5 1994), cert. denied, 513 U.S. 1126 (1995) 2

Carpenters v. Dillard Department Stores, 15 F.3d at 1283-84 5

Club Troika, 2 N.L.R.B. 90 (1936) 4

EEOC v. FLC & Bros. Rebel, 663 F. Supp. 864 (W.D. Va. 1987) 4

EEOC v. House of Prime Rib, 31 FEP (BNA) 981 (N.D. Cal. 1983), aff'd, 735 F.2d 1369 (CA 9 1984) 4

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 11

Flores v. Carnival Cruise Lines, 47 F.3d 1120 (CA 11 1995) 4

Frymire v. Ampex Corp., 61 F.3d 757 (CA 10 1995), cert. dismissed, 517 U.S. 1182 (1996) 2, 3, 6

Greenway v. Buffalo Hilton, 951 F. Supp. 1039 (W.D.N.Y. 1997) 4

Hilton Int. v. Union de Trabajadores, 600 F Supp.1446(D.P.R.1985) 4

Jackson v. McLeod, 748 F. Supp. 831 (S.D. Ala. 1980) 4

Jones v. Kayser-Roth Hosiery,
748 F. Supp. 1292 (E.D. Tenn. 1990) 3

Kelly v. Sabretech,
1999 U.S. Dist. LEXIS 15718, 15 IER 461
(S.D. Fla. 1999) 3

Livadas v. Bradshaw,
512 U.S. 107 (1994) 8

Metropolitan Edison v. NLRB,
460 U.S. 693 (1983) 8

NLRB v. Jones & Laughlin Steel,
301 U.S. 1 (1937) 8

NLRB v. Lee Hotel Corp.,
13 F.3d 1347 (CA 9 1994) 4

Nordstrom, Inc.,
229 N.L.R.B. 601 (1977) 8

OCAW v. Amer. Home Products,
790 F. Supp. 1441 (N.D. Ind. 1992) 4

Phelps Dodge Corp. v. NLRB,
313 U.S. 177, 61 S. Ct. 845(1941) 5

Priest v. Rotary,
634 F. Supp. 571 (N.D. Cal. 1986) 4

Saxion v. Titan-C Manufacturing Inc.,
86 F.3d 553 (CA 6 1996) 2, 6

Southern Ry v. Black,
127 F.2d 280 (CA 4 1942) 2

Times Herald Printing Co.,
315 N.L.R.B. 700, 147 L.R.R.M. (BNA) 1281 (1994) 9

Turic v. Holland Hospitality,
849 F. Supp. 544 (W.D. Mich. 1994) 4

UAW v. Shadyside Stamping,
6 IER 1640 (S.D. Ohio 1991), aff'd, 947 F.2d 946
(CA 6 1991) 3, 4

UMWA v. Martinka Coal Co.,
45 F. Supp. 2d 521 (N.D. W. Va. 1999), aff'd,
202 F.3d 717 (CA 4 2000) 2

United Steelworkers v. North Star Steel,
5 F.3d 39 (CA 3 1993), cert. denied, 510 U.S.
114, rehg. denied 2

Wasngton v. Air-Cap Industries,
860 F. Supp. 307 (D.S.C. 1994) 3

Williams v. Jacksonville Terminals,
315 U.S. 386 (1942) 2

Wright v. Universal Maritime Service Corp.,
525 U.S. 70 (1998) 8

STATUTES

29 U.S.C. §203(m) 2, 5

29 U.S.C. §2101(a) 3

29 U.S.C. §2102(a) 3

29 U.S.C. §2102(b) 3

29 U.S.C. §2104(a)(1) 4

29 U.S.C. §2104(a)(1)(A) 6

29 U.S.C. §2104(a)(2)(B) 7, 10

29 U.S.C. §2104(a)(4) 3

29 U.S.C. §2105 ..... 7, 10

STATEMENT OF THE CASE

Respondents incorporate herein the statement of facts in Section I of the Circuit Court's decision. Respondents provide this additional statement only because obligated by Rule 15.1 to "address any perceived misstatements of fact or law." Sands misstates the facts and law when it claims "Sands had no general obligation to guarantee its tip-earning employees tips or an opportunity to receive tips, and under the collective bargaining agreement between Sands and the union respondents. The regular rate of pay of unionized employees did not include tips." Pet. at 6. Under the identical collective bargaining agreement at other Las Vegas casinos, arbitrators have repeatedly held that the employer may not interfere with tipped employees' ability to earn tips, as the parties were cognizant of the tip income when they negotiated wage scales. Plaintiffs' Supplemental Excerpts of Record, Tab 57. While the contractual term "regular rate" did not include tips, that does not mean that for other purposes tips are not considered part of the employee's regular rate. For example, for each classification and shift the IRS calculated a regular rate of tips on which the employee paid taxes. Reported tips are the sole basis for the relief granted Plaintiffs here. [ER 315-27; PSER 102-60].

Thus even if "back pay . . . at a rate of compensation not less than the . . . regular rate" means (as Sands contends) "back pay . . . at a rate of compensation equal to the regular rate", it was Plaintiffs' contention below that here tips fell within the term "regular rate". Sands' contended otherwise by arguing that because it did not count employees' tips towards the "regular rate" for purposes of the Fair Labor Standards Act, that served to define regular rate here. Under the FLSA, as amended in response to

decisions finding tips to constitute wages,[1] an employer may under certain conditions take a tip credit for up to half its FLSA obligations, but need not do so. 29 USC §203(m).

REASONS FOR DENYING THE WRIT

There is no conflict between courts as to whether lost tips fall within the definition of "back pay" under the WARN Act. Nor is there any conflict over whether an employer can credit against WARN liability the severance payments which the employer contractually bound itself to pay anyway. The only inter-Circuit conflict which Sands can suggest is merely between general attitudes towards the WARN Act: the decision below reads the Act as a make-whole statute, while the Third Circuit reads it as more penal in nature and hence calls for payment each calendar day of violation rather than just each work day. *United Steelworkers v. North Star Steel,* 5 F.3d 39, 41-43 (CA 3 1993), *cert. denied,* 510 U.S. 114, *rehg. denied,* 511 U.S. 1048 (1994). There is no real conflict between the Third Circuit's holding and the decision at bar: a statute can make employees whole and then also impose an added penalty. Moreover, every other Circuit to have considered the calendar-day versus work-day issue has rejected the Third Circuit's view. This Court has repeatedly denied petitions for certiorari to review that issue.[2] It

---

[1] *Williams v. Jacksonville Terminals,* 315 U.S. 386 (1942); *Southern Ry v. Black,* 127 F.2d 280 (CA 4 1942).

[2] *Burns v. Stone Forest Industries,* 147 F.3d 1182 (CA 9 1998), *cert. denied,* 525 U.S. 1040 (1998); *Breedlove v. Earthgrains Baking Cos., Inc.,* 140 F.3d 797 (CA 8 1998), *cert. denied,* 525 U.S. 921 (1998); *Frymire v. Ampex Corp.,* 61 F.3d 757, 771-72 (CA 10 1995), *cert. dismissed,* 517 U.S. 1182 (1996); *Saxion v. Titan-C Mfg. Inc.,* 86 F.3d 553 (CA 6 1996); *Carpenters District Council v. Dillard Dept. Stores,* 15 F.3d 1275, 1285 (CA 5 1994), *cert. denied,* 513 U.S. 1126 (1995);

would be illogical to now grant certiorari after denying it all in those prior cases. There is even less reason for this Court to take up the questions of tips and severance pay than there is to review the more-difficult issue of whether a payment is required for each calendar day.

These are not matters of general public importance. It is hard for an employer to ever get in a situation where WARN damages need be computed. First, many (probably most) layoffs and shutdowns are not covered by the Act, as there must be over 50 full-time employees impacted at a single location of an employer with over 100 full-time employees. 29 USC §2101(a). See GAO, "Dislocated Workers: Implementation of the Worker Adjustment and Retraining Notification Act (WARN)" Report T-HRD-93-6 (February 23, 1993)(less than half of shutdowns since Act passed were covered). Second, what the Act requires in these situations is quite simple: sending a notice at least 60 days in advance of closing. 29 USC §2102(a). Third, if the employer fails to give notice, it can rely on several broad exemptions, such as for "seeking capital" or "unforeseeable business circumstances." 29 USC §2102(b). Fourth, even if the employer has no such exemption, it can still be readily rescued by the broad "good faith" clause in 29 USC §2104(a)(4).[3] Finally, the questions involved in this case arise only for the minority

---

UMWA v. Martinka Coal Co., 45 F. Supp. 2d 521 (N.D. W. Va. 1999), *aff'd*, 202 F.3d 717 (CA 4 2000); *Kelly v. Sabretech*, 1999 US Dist. LEXIS 15718, 15 IER 461 (S.D. Fla. 1999); *Boilermakers v. Allsteel*, 9 F. Supp. 2d 901 (N.D. Ill. 1998); *Assn v. Western Pulp & Paperworkers v. Grays Harbor Paper Co.*, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. 1994); *Washington v. Air-Cap Indus.*, 860 F. Supp. 307 (D.S.C. 1994); *Jones v. Kayser-Roth Hosiery*, 748 F. Supp. 1292(E.D. Tenn. 1990).

[3] *See, e.g., Frymire v. Ampex Corp.*, 61 F.3d 757 (CA 10 1995)(holding district court abused its discretion in not reducing liability on good faith grounds); *UAW v. Shadyside Stamping*, 6 IER 1640 (S.D. Ohio

of workers who are tipped or who receive contractually-mandated severance pay without waiving all claims against their former employer.

The decision here cannot be seriously questioned: it has been settled for more than 50 years under numerous federal and state employment laws that "back pay" includes lost tips.[4] Sands misconstrues the WARN Act as defining the damages as merely the regular hourly wage rate. The statute's critical language is instead "back pay for each day of violation at a rate of compensation not less than . . . the regular rate." 29 U.S.C. §2104(a)(1). If

---

1991), aff'd, 947 F.2d 946 (CA 6 1991)(relying on good faith to relieve employer of all liability); *OCAW v. Amer. Home Products,* 790 F. Supp. 1441 (N.D. Ind. 1992)(same result).-

[4] *See, e.g., NLRB v. Lee Hotel Corp.,* 13 F.3d 1347 (CA 9 1994); *Club Troika,* 2 NLRB 90, 94 (1936)("In the restaurant trade tips received by a waiter are generally regarded as part of his salary, so that the wage paid by the employer is lower than what would normally, and otherwise, be paid. * * * Consequently, in order that the discharged employees be made whole the term 'back pay' must under these circumstances be regarded as included both the wage paid and the tips received."); *Hilton Int. v. Union de Trabajadores,* 600 F. Supp. 1446, 1451 (D.P.R. 1985) ("We start with the proposition that tips are wages, part of the grievant's compensation as a waiter, and properly included in a back pay award."); *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1124-5 (CA 11 1995)(seaman's right to recover wages while unable to work includes the right to tips: "An overwhelming majority of the courts that have considered this question have determined that tip income is recoverable as part of an individual's "average weekly wage" under workers' compensation laws.[citing annotation discussing 50 cases]"); *EEOC v. House of Prime Rib,* 31 FEP (BNA) 981, 983-84 (N.D. Cal. 1983), aff'd, 735 F.2d 1369 (CA 9 1984)(Title VII); *Priest v. Rotary,* 634 F. Supp. 571, 579-80, 585 (N.D. Cal. 1986)(Title VII); *Greenway v. Buffalo Hilton,* 951 F. Supp. 1039, 1062 (W.D.N.Y. 1997)(ADA); *Turic v. Holland Hospitality,* 849 F. Supp. 544, 557 (W.D. Mich. 1994); *EEOC v. FLC & Bros. Rebel,* 663 F. Supp. 864, 869 (W.D. Va. 1987); *Jackson v.McLeod,* 748 F. Supp. 831, 836 (S.D. Ala. 1980).

WARN damages were capped by the regular hourly wage rate, then the many employees who receive primarily sales commissions, tips or piece rates would all be left largely unprotected by WARN. However, even if WARN damages were limited to the "regular rate", here tips were part of the regular rate: the IRS set a regular daily tip rate for all Sands' employees.[5] In *Carpenters v. Dillard Dept. Stores,* 15 F.3d at 1283-84, the Court expressed a make-whole view of WARN's remedial provision which supports the inclusion of tips here:

> Indeed, the Supreme Court has said that "back pay" requires "payment . . . of a sum equal to what [the employees] normally would have earned" had the violation never occurred. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 854 (1941). ---- Further, the Supreme Court has explained that "back pay" suggests a remedy such that the damaged employee is restored "as nearly as possible,, to that which would have [been] obtained but for the [violation]." *Id.* at 194, 61 S. Ct. at 852. * * * [T]he legislative history makes it clear that Congress intended the "back pay" language in WARN to connote the traditional back pay remedy as discussed in *Phelps Dodge* [cite].

---

[5] There is no reason for this Court to construe "regular rate" as carrying all the statutory and regulatory complications of the Fair Labor Standards Act, under which an employer can choose whether or not to credit tips against part of the minimum wage and hour requirements, but may lose such ability should it fail to give proper notice to employees. 29 USC §203(m). The FLSA and its regulations reflect the fact that it would be very hard as an administrative matter for employers to change each employee's overtime pay rate each week based on the amount of tips received that week. No such administrative burden is posed by the one- time payment required by theWARN Act.

Accord, Saxion v. Titan-C Manufacturing, 86 F.3d at 559 (rejecting argument "that 'back pay', as used in §2104(a)(1)(A), does not mean what it normally means."); *Frymire v. Ampex*, 61 F.3d at 764 ("the WARN remedy of back pay mirrors the type of remedy afforded those who fall victim to an implied contract breach—giving individuals what they would have been entitled to had there been no breach").

Sands' interpretation not only defies the statute's make-whole goal, but also provides much less deterrent effect against failure to give notice. Tipped employees often receive minuscule regular wages. If an employer need not be concerned about WARN liability, then it would rarely have any incentive to give 60 days' notice: giving notice leads employees to "jump ship" to other employers and may cause suppliers and customers to also change how they do business with the employer. For example, here Sands abandoned its "good faith" defense after the Union initiated discovery to confirm that Sands intentionally delayed giving notice until after other new hotels in town had completed most of their hiring. App. 68. The decision below thus properly included "tips" within the back pay award.[6]

[6] Sands alleges the decision below will lead employers of tipped personnel to keep them at work rather than simply paying them for the 60-day period and giving them this time to look for work. However, the Senate rejected a proposed amendment which would have authorized just such a pay-off in lieu of notice. Cong. Rec. June 24, 1999 S8541-43 *(Legislative History of S. 2527* (House Comm. on Educ. & Labor 1990) at 247-50). This amendment was defeated because the bill's proponents wanted to keep employees together still working, for (1) this would likely be the only way another buyer could be located for the plant, particular a buyout by the employees, and (2) this would be the most effective way of create a retraining and job search program: Congress had before it evidence from experts that once employees are laid off and each go their own way, retraining programs are ineffective.

With regard to severance pay, the decision below flowed from clear statutory language: an employer may not take a credit against WARN damages for payments "required by any legal obligation". 29 USC §.2104(a)(2)(B). *See also* 29 USC §2105 (WARN remedies "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees.") The decision here does not impose any interference with the bargaining process under the NLRA, nor

---

Id. at 133 (Bonior: "What we are trying to do is prevent plant closings. What we are trying to do is allow people to get together with ESOP's and into community involvement."); 148 (Williams discusses the studies of retraining); 151, 156 (Conte discusses same); 161 (Walgren: "by setting out time to explore alternatives, to attract new owners, or to negotiate a worker buyout."); 165-66 (Kleczka about encouraging employee buyouts); 250-51 (Metzenbaum denounces proposed amendment because "the bill is about notice. It is not a mandatory severance bill . . . .As stated by the National Academy of Sciences, certainly an impartial objective body, it is the notice that is essential to successful worker adjustment programs. * * * That is what a top General Motors executive said recently. . . . To quote his words: ' If we can get to people early we will involve about 85 percent of them in our retraining program, but once they are laid off, we only get 10 to 15 percent.' What he is saying is, we have to have them together in the plant in order to get across to them what can be done for retraining and how they can go out and find another job. We are not seeking to get workers paid because their plant is closing. We are trying to get them retrained. We are trying to put them back into the mainstream of the job market. If we wait to tell people they are losing their jobs until the day of the job loss, then according to the top executive of General Motors, 75 percent will drift away without every getting counseled or trained for a new job."); 254 ("This amendment is unfair to employees, as well as employers. * * * The employees are going to be anxious to get the money. They are not going to be thinking about job training and counseling. * * * There is a tendency on the part of many people: Just get the buck. Get the money. [']Gosh, if I can get 2 months pay, that would be far better for me. I am not worrying about counseling or training. I just want the money.['] I think that is hurtful to the whole economic picture in the country.").

impose an unfair burden on employers. All employers need do in order to credit severance pay against WARN backpay is to be "up front" in negotiations that they want such a credit. In other words, employers with concerns about WARN liability can do what employers nowadays routinely do anyway when they discharge employees: make severance pay conditional upon the employee waiving his or her legal rights against the employer.[7] What Sands really wants here is a waiver through silence, an approach this Court has repeatedly rejected in requiring any employee waivers of statutory rights instead be "clear and unmistakable". *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994); *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983).

Thus, the decision below does not create a conflict with employers' NLRA obligations: they do not have to offer severance pay, but if they do, they can make their offer conditional on this pay being credited against any WARN liability. Sands misrepresents the NLRA when it contends that the employer is faced with the Hobson's choice of unlawfully refusing to bargain or giving up any offset right by bargaining to agreement. *See NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 45 (1937) ("The [National Labor Relations] Act does not compel agreements between employers and employees"); *Nordstrom, Inc.*, 229 NLRB 601, 601-2 (1977) (permissible for employer to reduce its money offer if union will not agree to the portion of employer proposal seeking relief on non- mandatory subjects of bargaining, such as waiving

[7] As to non-bargaining-unit employees, Sands could also have done what employers nowadays routinely do in announcing benefits in their personnel manuals: disclaim any contractual intent, indicating those benefits were intended but were not guaranteed.

employee rights).[8]

The WARN Act says "required by any legal obligation," not—as Sands would have it—"any legal obligation preexisting the date WARN notice was due." This Court will not read a qualifier into a remedial statute's broad language absent strong evidence that Congress intended such a qualifier, evidence which is lacking here. Here, Sands promised extra money to employees in part to keep them from "jumping ship" and thus make it easier for Sands to keep the hotel operating profitably until closure. There is no policy reason to judicially rewrite a statutory scheme for simplified damages calculation so as to relieve the employer of liability on account of pay due employees anyway as a matter of contract law.

The decision below is supported by the National Labor Relations Board decision in *Times Herald Printing Co.*, 315 NLRB 700, 702, 147 LRRM (BNA) 1281, 1283-84 (1994), rejecting an employer's effort to deduct WARN payments from the money due as a result of the employer's unlawful failure to engage in effects bargaining concerning the closure:

---

[8] WARN's legislative history confirms that labor and management were expected to bargain offsets. Senator Jeffords (one of the principal authors) stated "if employers and employees have bargained for other benefits, they would generally be in addition to the penalties provided under this bill. I think this is proper, but I expect that collective bargaining agreements in the next few years will be adjusted to take this legislation into account." Cong. Rec. July 13, 1988 at H5510 (reprinted in *Legislative History of S2527* (House Comm. On Educ. & Labor, 1990 at 158).

In reaching this conclusion, we rely primarily on the plain language of the WARN statute itself. Section 6 of WARN, 29 U.S.C. §2105, states as follows:

> The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or by any other statute.

Thus, the explicit language of the statute makes clear that the Respondent's obligations under WARN "are in addition to, and not in lieu of" the Respondent's remedial obligations under the NLRA, and that WARN remedies "do not alter or affect" NLRA remedies. It is difficult to see how Congress could have made its intent any plainer: WARN payments do not offset payments required by other federal labor laws, such as the NLRA. There is nothing to the contrary in the WARN statute or its legislative history.

Consistent with this interpretation, Section 5(a)(2)(B) of WARN, 29 USC §2104(a)(2)(B), provides that an employer's WARN liability may be reduced by any voluntary and unconditional payment to an employee "that is not required by any legal obligation." Backpay paid to an employee pursuant to a Board order 13 would, of course, constitute a payment "required by a legal obligation." Thus, amounts paid pursuant to a *Transmarine* remedy would not reduce an employer's liability under WARN. In sum, there is

> an apparent symmetry in the WARN statute: under Section 6, WARN payments do not offset *Transmarine* payments, and under Section 5(a)(2)(B), *Transmarine* payments do not offset WARN payments. * * * [B]oth WARN payments and *Transmarine* payments are necessary if the status quo ante is to be restored and the Respondent's employees are to be made whole for the losses they incurred. The WARN payments remedy the Respondent's violation of its obligation to give advance notice of its decision to cease operations. The *Transmarine* payments remedy the Respondent's violation of its obligation to allow for meaningful bargaining over the effects of its decision to cease operations. Under the judge's decision, the employees are compensated for the notice violation but they receive nothing for the effects bargaining violation. This loss is significant because effects bargaining can result in such additional benefits as pension fund payments, health insurance coverage and conversion rights, preferential hiring at other employer plants, and reference letters for jobs with other employers. *See First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 681-82 (1981).

Thus the Circuit Court decision here flows from established precedent without conflicting with any other court decision. The decision below adheres to plain statutory language. It reaches a result consistent with the statutory purposes. There is no reason for this Court to grant the writ.

CONCLUSION

Sands' petition for certiorari should be denied.

Respectfully submitted,

Richard G. McCracken
McCRACKEN, STEMERMAN, BOWEN & HOLSBERRY
1630 S. Commerce Street, Suite A-1
Las Vegas, Nevada 89102
(702) 386-5107

Attorneys for Respondents